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Wisconsin Judicial Benchbook Volume III: Family

IN MEMORIAM

SUMMARY TABLE OF CONTENTS

Benchbook: Master Index

Pre-1994 ACKNOWLEDGMENTS

Post-1994 ACKNOWLEDGMENTS

USER'S GUIDE AND ABBREVIATIONS

TABLE OF CONTENTS

FA 1: STIPULATED DIVORCE

1..... Default Checklist and Sample Findings

- A. Before case is called, clerk/Judge to establish that the following documents are in Ct file
- B. After witness is sworn, the following preliminary questions should be asked
- C. Stipulated divorce hearing—if no children
- D. Stipulated divorce hearing—if minor children

2..... Jurisdiction

- A. Residence
- B. Child custody jurisdiction
- C. Personal jurisdiction
- D. Quasi in rem jurisdiction

3..... Initiation of Action

- A. Either or both parties to marriage can initiate divorce action
- B. Summons
- C. Petition
- D. Prohibitions upon commencement of action

4..... Hearing

- A. Appearances
- B. Determine that residence and jurisdictional requirements are present (120-day waiting period

- C. Determine that proper service and notice given
- D. Determine that vital statistics form submitted by parties
- E. Determine whether grounds for divorce
- F. Review financial disclosure statements of the parties
- G. Read stipulation (See Checklist at beginning of chapter)
- H. Child support
- I. Child legal custody and periods of physical placement
- J. Review financial matters in stipulation carefully, against background of full information on parties' economic status and resources
- K. Approval or modification of stipulation by Ct
- L. CCC may preside at hearing and grant and enter judgment if

5..... Judgment

- A. Make sufficient findings and conclusions to support judgment of divorce and to support decisions on financial matters and child legal custody and periods of physical placement
- B. Grant any request by party to resume a former legal surname, except as provided in § 301.47
- C. Inform parties that although divorce is effective immediately, any marriage contracted within 6 months by either party is void
- D. Direct moving party to draft findings of fact, conclusions of law, and written judgment to be submitted to Ct within 30 days
- E. If support or maintenance awarded
- F. If child legal custody or physical placement decided, judgment must
- G. Ct to require medical history and report of any medical examination parent had within a year of order to be provided

FA 2: CONTESTED DIVORCE

1..... Jurisdiction

- A. See Jurisdiction in Stipulated Divorce, FA 1

2..... Initiation of Action

- A. Parties
- B. Summons
- C. Contents of petition
- D. Prohibitions upon commencement of action
- E. Response
- F. Service on Office of FCC
- G. Service on CSA

3..... Pretrial Matters

- A. Statutory waiting period
- B. Disclosure of assets
- C. GAL
- D. Referee

4..... Temporary Orders

- A. While action is pending, Ct or CCC may make just and reasonable orders about

- B. Order made on motion served at time action commenced or any time after commencement
- C. Order may be based on stipulation of parties
- D. Ct or CCC must consider factors governing final judgments in subject covered by order (e.g., if deviating from percentage standards, must state reasons)
- E. If CCC believes domestic abuse TRO or injunction may be appropriate, shall inform parties of procedures
- F. CCC's temporary orders reviewable by Ct upon motion of any party

5..... Suspension to Effect Reconciliation

- A. During pendency of action, Ct may suspend all orders and proceedings for discretionary period, up to 90 days
- B. Effect of reconciliation suspension
- C. Suspension revoked by Ct order on motion of either party
- D. If parties reconcile, action dismissed
- E. If parties fail to reconcile, action proceeds as if there had been no reconciliation attempt

6..... Trial

- A. Appearance of parties
- B. Servicemembers Civil Relief Act
- C. Appearance of CCC
- D. Trial procedure
- E. Prerequisite matters to be proved at trial
- F. Evidence presented at trial

7..... Stipulations in Contested Trials

- A. Parties may agree to partial, pre-judgment stipulations, subject to approval of Judge under § 767.333
- B. Parties may, subject to approval of Ct under § 767.34, stipulate to
- C. However, agreements or stipulations entered into after commencement of proceedings not binding on Ct

8..... Findings, Judgment, and Warnings

- A. Determine that jurisdictional and residence requirements have been met
- B. Determine whether marriage irretrievably broken
- C. Determine related matters
- D. Inform parties that although divorce is effective immediately, any marriage contracted within 6 months by either party is void
- E. Warnings in judgment
- F. TPR warning
- G. Medical information

9..... Written Findings of Fact and Conclusions of Law

- A. Form of judgment

10..... Changes in Judgment

- A. Ct may vacate or modify judgment on marital status issues upon good cause shown, within 6 months after granting such judgment
- B. Ct shall revoke judgment and orders not affecting rights of a third party if parties afterward intermarry, and if
- C. If judgment vacated or revoked, Ct shall order impoundment of record of action
- D. Fraud on Ct in disclosure of assets

E. Other motions for relief from judgment governed by Rules of Civil Procedure

F. Appeal of judgment

FA 3: ALTERNATIVE DISPUTE RESOLUTION (ADR) IN FAMILY CASES

1..... Types of ADR Methods Available in Family Cases

A. Direct negotiation—no 3rd party involved

B. Early neutral evaluation—neutral 3rd party gives an appraisal with suggestions

C. Mediation—neutral 3rd person helps parties reach agreement voluntarily

D. Moderated settlement conference—at settlement conference, one or more neutral 3rd parties receive brief presentations and render advisory opinion

E. Nonbinding arbitration—neutral 3rd party renders nonbinding decision, which may also be basis for subsequent negotiation between parties

F. Binding arbitration—neutral 3rd person given authority to render legally binding decision

G. Referee—neutral 3rd person appointed by an order of the Ct. The order must specifically delineate the authority of the referee, but shall not impermissibly delegate to the referee judicial power that is constitutionally vested in the Ct

2..... ADR Referrals by the Judge

A. Judge may, with or without motion, upon determining that action is appropriate for ADR, order parties to select settlement alternative

B. Procedure to follow

3..... Mediation Referrals

A. Must be ordered in any action affecting the family, including revision of judgment in which legal custody or physical placement is contested

B. Ct must inform parties that confidentiality of communications in mediation is waived if parties stipulate under § 767.405(14)(c) that person who mediates may also do the custody or placement study

C. Ct must inform parties that Ct may waive requirement to attend at least one mediation session if Ct finds that attending session will cause undue hardship or would endanger health or safety of one of the parties, and Ct must inform about bases on which Ct may make its determination. See also Sec. G, *infra*

D. If parties wish to have joint custody, Ct must refer for mediation if either party requests assistance

E. Person who has placement, custody, or visitation rights, or child of person who has placement may notify CCC of a problem

F. Parties may use private mediator at own expense

G. Parties must attend at least one session and file a proposed parenting plan at least 10 days before the initial session. If mediation determined appropriate, no Ct may hold a trial on custody or placement unless

H. When Ct requires mediation, property division, maintenance, and support may not be considered unless

I. Mediation agreement requirements

J. Lawyer-mediators' ability to draft

K. Non-lawyer mediator ability to draft

L. Ct may approve or reject agreement, but if it rejects shall give reasons in writing

M. If no agreement, parties or mediator shall notify Ct, which shall appoint GAL and consider referral for custody or placement study

N. Parties may return to mediation at any time before any trial or final hearing

4..... Binding Arbitration

A. Requirements to proceed

- B. Although following issues may be arbitrated, special requirements apply
- C. No confirmation of an award involving any of above issues unless all of following apply
- D. Above special requirements do not apply to
- E. Confirmation of arbitration decision

5..... Referee

- A. A referee shall have such qualifications as the Ct deems appropriate
- B. Appointment of a referee shall be the exception not the rule and shall be made only upon a showing that some exceptional condition requires it
- C. The order appointing a referee must specifically delineate the authority of the referee, but must not impermissibly delegate to the referee judicial power that is constitutionally vested in the Ct
- D. The referee shall prepare a report and, if required to make findings of fact and conclusions of law, the referee shall set them forth in the report
- E. In a family action, the Ct shall accept the referee's findings of fact unless clearly erroneous
- F. The effect of the referee's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a referee's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered

6..... Admissibility

- A. Except for binding arbitration, all settlement alternatives are compromise negotiations for purposes of § 904.08 (compromise and offers of compromise generally not admissible) and mediation for purposes of § 904.085 (communications in mediation generally not admissible)

FA 4: USE OF CONTEMPT

1..... Contempt Generally

- A. Types of contempt generally
- B. Contempt to enforce Ct order or judgment in divorce proceeding is remedial in nature

2..... Authority, Purpose, and Extent

- A. Family Ct has inherent power to enforce its orders through contempt of Ct proceedings
- B. Ct also has specific statutory authority to enforce orders through contempt
- C. Purpose of contempt is remedial or coercive and designed to enforce private right of party in Ct order
- D. Extent of Use

3..... Time Considerations

- A. An action to collect judgment generally must be brought within 20 years after judgment, but actions to collect child-support arrearages may be brought within 20 years after the youngest child reaches age of 18 or, if child is enrolled full-time in high school or its equivalent, 20 years after that child reaches age of 19

4..... Initiation of Contempt Proceedings

- A. Manner of commencement
- B. Applicable when financial obligation incurred under
- C. In issuing order to show cause, Ct must determine that income assignment proceeding under § 767.75 is inapplicable, impractical, or unfeasible
- D. Payer must be notified of proceeding

5..... Hearing Required

- A. Before impartial decision-maker
- B. Order must be issued by Judge if confinement to be imposed

- C. Right to counsel at state expense limited
- D. Moving party's burden of proof to show
- E. Alleged contemnor's burden of proof
- 6..... Sanctions and Alternative Purge Conditions
 - A. Types of sanctions and alternative purge conditions authorized
 - B. General requirements for purge and alternative purge conditions
- 7..... Findings and Order
 - A. Essential findings
 - B. Authorized findings
- 8..... Violation of Purge Conditions
 - A. Requires same contempt procedures regarding hearing and findings before enforcement of underlying contempt order
 - B. Contemnor has burden to show purge condition unreasonable or noncompliance was unintentional or result of unforeseen events
 - C. Ct may modify if condition not feasible or not reasonably related to cause of underlying contempt
- 9..... Bankruptcy as a Defense
 - A. Discharge does not apply to "Domestic Support Obligation" or other debts incurred during course of divorce
 - B. "Domestic Support Obligation"
 - C. Other debts incurred during course of divorce
 - D. Particular circumstances
- 10..... Appeal
 - A. If CCC or Cty prosecutes contempt action, appeal governed by rules for criminal appeals, § 809.30
- FA 5: OTHER ENFORCEMENT
- 1..... General Authority
 - A. Ct may order any payment for support, maintenance, Atty fees, and paternity obligations to be paid in amounts and at times it considers expedient
 - B. Ct may enforce judgment for support, maintenance, paternity obligations, or Atty fees by any appropriate remedy
 - C. Ct retains jurisdiction to enforce past-due child support payments through contempt proceedings even when proceedings commenced after child reaches age of majority
- 2..... Judicial Enforcement Remedies
 - A. Income withholding (assignment) effective immediately
 - B. Money judgment for past-due payments
 - C. For failure to pay child support, lien may be placed on ships, boats, and vessels under Ch 780
 - D. Execution of order or judgment
 - E. Satisfaction out of any property attached under Ch 811
 - F. Garnishment
 - G. Interception of federal and state tax refunds
 - H. Contempt
 - I. Criminal action for intentional failure to pay child or spousal support when obligor knows or should know of that legal obligation
 - J. See Action to Compel Maintenance or Support, FA 19, for further details

3..... Assignment (Income Withholding)

- A. Upon entry of each order for support or maintenance, or approval of stipulation for child support, Ct shall provide notice of assignment to person from whom payer receives or will receive money
- B. Attributes of withholding assignments
- C. When assignment not effective immediately
- D. Interstate income withholding

4..... Interception of Federal and State Tax Refunds

- A. DCF is central agency for administering tax intercept program in Wis
- B. DCF must certify delinquent support or maintenance payments to Wis Dept of Revenue or Federal Office of Child Support Enforcement (OCSE)

5..... Judicial Review of Administrative Remedies

- A. Powers of DCF and CSA
- B. Pension plan intercepts
- C. Delinquent support property liens
- D. Freezing of financial accounts
- E. Seizure of other personal property
- F. Seizure of real estate
- G. Joint ownership interests
- H. Support obligor's interest in judgment or settlement
- I. Ct review of action against license

6..... Summary of Administrative Remedies

- A. See table on following page

FA 6: UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA)

1..... General Provisions

- A. Coverage and definitions
- B. Types of enforcement

2..... Jurisdiction

- A. State issuing support order retains continuing, exclusive jurisdiction to modify its child support order if the order is the controlling order, and
- B. Wis loses jurisdiction and may not exercise continuing, exclusive jurisdiction to modify its order if either
- C. After loss of jurisdiction, when Ct of another state modifies order, Wis Ct must recognize continuing, exclusive jurisdiction of the other state's Ct
- D. Conflicting child support orders to be resolved by the following rules
- E. Child support orders for two or more children of same obligor issued by Wis and another state or a foreign country, shall be enforced in the same manner as if the orders had been issued in Wis
- F. Wis Ct has jurisdiction over nonresident if any of the following applies
- G. Simultaneous proceedings

3..... Direct Enforcement

- A. Income-withholding order of another state may be sent by or on behalf of obligee or by support enforcement agency to obligor's employer or other debtor, as specified in § 767.75(1f), in Wis who shall do the following

- B. Contest validity of income-withholding order by registering order in Wis Ct and filing contest to that order under Ch 769 Subch VI, or otherwise contesting order in same manner as if order issued in Wis
- C. Administrative enforcement of support order or income-withholding order may occur if
- D. If obligor contests validity or administrative enforcement of order, CSA to register the order as provided under UIFSA

4..... Petition for Enforcement

- A. Verified petition and accompanying documents must contain the following, so far as known
- B. Nondisclosure
- C. Responding Ct, upon receipt of petition, shall
- D. Responding Ct has power to
- E. Communications between Cts
- F. Discovery
- G. Special evidentiary rules
- H. Fees and costs
- I. Limited immunity of petitioner

5..... Petitions to Establish Support Obligation or Determine Parentage

- A. Petition to establish support order
- B. Determination of Parentage

6..... Registered Support Orders

- A. Support order of another state or a foreign support order may be registered in Wis upon receipt of following records
- B. Upon registration, Ct must give notice to nonregistering party
- C. Effect of registration
- D. Contesting registration of order
- E. Confirmed order
- F. Modification of registered order
- G. Recognition of order modified in another state

7..... Interstate Rendition (Extradition)

- A. Governors may make demand for surrender of individual found in another state who is criminally charged in demanding state for failure to provide for the support of an obligee
- B. Extradition of individuals not inconsistent with UIFSA applies to demand even if individual was not in demanding state when crime was allegedly committed and has not fled from that state

8..... Judicial Bench Cards for UIFSA Cases

9..... Orders Under UIFSA Flowchart

FA 7: TAX CHECKLIST

1..... Property Division

- A. Transfers of property “incident to divorce” are nontaxable events
- B. Property division payout is dischargeable in bankruptcy

2..... Maintenance

- A. Income to recipient, deductible to payer IF
- B. Parties may elect to make payments not taxable to recipient and not deductible to payer, or Ct may so order
- C. Temporary maintenance

D. Maintenance obligation not dischargeable in bankruptcy

3..... Child Support

- A. Support payments not deductible to payer; not income to payee
- B. To qualify as child support, amount must generally be specifically identified as child support
- C. Allocation of dependency exemption
- D. Dependency exemption not necessary to get head of household status or child care credit
- E. Medical expenses can be deducted by parent who pays, regardless of which party entitled to claim dependency exemption
- F. Child support not dischargeable in bankruptcy. See *infra* Sec. 5

4..... Bankruptcy

- A. Discharge does not apply to “Domestic Support Obligation” or other debts incurred during course of divorce
- B. “Domestic Support Obligation”
- C. Other debts incurred during course of divorce

5..... Tax Calculations

- A. Use of tax calculations generated by computer programs permitted if
- B. But when no expert testimony presented, Ct may rely on own knowledge and experience to engage in reasonable speculation about anticipated tax impact on present value of retirement assets. See FA8—Property Division, Sec. 5.J., Tax Consequences

FA 8: PROPERTY DIVISION

1..... Prenuptial and Postnuptial Marital Property Agreements

- A. Any written agreement must be attached to the divorce petition
- B. May apply to maintenance and/or property division
- C. If agreement applies to financial issue at death only, the agreement does not apply to financial issues in divorce
- D. Agreement must be equitable to be binding

2..... Disclosure of Assets and Liabilities

- A. Ct shall require each party to disclose all assets, debts, and liabilities
- B. Assets required to be disclosed
- C. Information pertaining to debts and liabilities
- D. Statement of income earned to date for current year and most recent withholding statement from employer under § 71.65(1)(a)
- E. State/federal income tax returns for last 2 years
- F. Failure to file disclosure allows Ct to accept other party’s information as accurate
- G. Information is confidential

3..... Marital Estate

- A. Includes all property of either party, whether acquired before or during marriage, except exempted property
- B. Marital assets include
- C. Debts

4..... Nonmarital Estate

- A. Property exempted from marital estate
- B. Effect of changes to nonmarital property
- C. Nonmarital assets may be subjected to property division in case of hardship

5..... Valuation of Property

- A. In general
- B. Valuation Principles
- C. Real estate and tangible personal property
- D. Closely held, family corporations
- E. Stock options
- F. Partnerships, professional service corporations
- G. Retirement and pension plans
- H. Professional degree
- I. Other assets and liabilities
- J. Tax consequences

6..... Division of Marital Assets

- A. Ct shall presume marital property to be divided equally
- B. Any deviation from presumptive equal property division must be based on consideration of all of the following factors
- C. Property division by stipulation
- D. Installment payments in contested cases
- E. Set aside for children

7..... Depletion, Waste, or Fraudulent Transfer of Marital Assets

- A. Ct may make temporary order prohibiting either party from disposing of assets within jurisdiction of Ct
- B. Any asset with fair market value of \$500 or more owned by either or both parties, is rebuttably presumed to be part of estate for property division, if
- C. Waste: Dissipated or Mismanaged Marital Assets
- D. Joinder of third party proper to resolve equitable claim relating to marital property fraudulently conveyed
- E. Uncooperative party cannot be heard to complain of Ct's inclusion of asset in marital estate when that party had relevant information in that party's control but refused to provide it

8..... Findings, Conclusions, Judgment, and Order

- A. Findings and conclusions
- B. Findings of fact, conclusions of law, and written judgment drafted by petitioner, unless Ct otherwise directs
- C. Divest and transfer title as required by property division
- D. Jointly held property
- E. Out-of-State property
- F. Retirement plans
- G. Military pensions

9..... Continuing Jurisdiction on Death of Party

- A. After oral divorce judgment, family Ct retains jurisdiction to take evidence on property division and make final judgment, despite death of party
- B. After divorce judgment, family Ct has concurrent jurisdiction with probate Ct over Ct-ordered division of property

10..... Modification and Relief from Judgment

- A. Final property division cannot be modified pursuant to § 767.59(1c)
- B. Discretion to grant relief from judgment under § 806.07

C. Fraud on Ct

FA 9: MAINTENANCE

1..... Purposes

- A. Two distinct but related objectives: Support and Fairness
- B. Flexibility
- C. May be granted even when divorce or separation is denied

2..... Determination of Amount of Maintenance

- A. Prenuptial and Postnuptial Marital Property Agreements may apply. See FA 8, Property Division, Sec. 1
- B. Financial resources available at time maintenance determination made
- C. Need of recipient
- D. Impact on payer's employment incentive
- E. Statutory factors Ct must consider, when relevant

3..... Determination of Term of Maintenance

- A. Award may be for limited or indefinite period of time
- B. If Ct limits term of maintenance or holds maintenance open, must explain why

4..... Orders During Pendency of Action Under § 767.225

- A. Ct or CCC may require either party to pay maintenance during pendency of action
- B. Order may be based on written stipulation of parties
- C. CCC orders reviewable by Ct
- D. Temporary maintenance paid during pendency of action should not be subtracted from receiving spouse's property or maintenance in final order
- E. Temporary maintenance pending appeal

5..... Judge-Approved Stipulated Initial Orders Before Judgment Under § 767.333

- A. Parties must file a written stipulation with the Ct, specifying the terms of that agreement
- B. Before entering an initial order based on the stipulation, the Judge must hold a hearing on the record with both parties and the child support agency, if a party, to determine the parties' understanding of the stipulation and ensure it is intended by both parties as the initial order on the terms set forth
- C. Before a Judge may approve a stipulation relating to maintenance, the Judge must comply with statutory requirements otherwise applicable to such determinations in actions affecting the family under current law
- D. A party seeking modification of a stipulation on maintenance must comply with existing statutory requirements for revision of maintenance orders

6..... Court-Approved Stipulations Under § 767.34

- A. Parties may stipulate to maintenance during the pendency of the action. See Secs. 4 and 5, supra, for requirements
- B. Parties may stipulate as to whether maintenance will be paid, in what amount, and for what period of time
- C. Stipulations are recommendation of parties not binding on Ct
- D. Ct must examine carefully, against background of full information on parties' economic status and resources
- E. Examine parties to ensure
- F. Ct may modify stipulation in interest of justice
- G. If either party repudiates stipulations before trial, must set case for trial as contested proceeding

7..... Findings, Conclusions, and Order

- A. Prerequisites

- B. May hold maintenance award open to retain jurisdiction to award maintenance in the future
- C. Shall direct payment of maintenance to DCF or designee
- D. Shall warn parties that disobedience of maintenance order punishable as contempt with possible imprisonment, along with costs and expenses of proceeding
- E. Order is assignment of income

8..... Revision and Modification of Final Orders and Judgments

- A. Ct may revise maintenance order, from time to time
- B. Limited maintenance
- C. Criteria for revision
- D. Ability to pay

9..... Termination/Vacation of Order

- A. Ct shall vacate maintenance order
- B. At death of payer or payee spouse (whichever occurs first), maintenance terminates unless stipulated otherwise
- C. If Ct vacates order, must preserve right of State to collect arrearages owed if either party was recipient of aid under Ch 49

10..... Shirking

FA 10: CHILD SUPPORT

1..... Purposes

- A. Legislative intent that standard of living of minor children be maintained at level they would have enjoyed had marriage not ended
- B. This means child's lifestyle may materially rise or fall with the postdivorce fortunes of the parents

2..... Who Is Liable

- A. Ct shall require either or both parents to pay
- B. Ct generally may order either or both parents to seek employment or participate in an employment or training program
- C. Child's entitlement to support does not extend beyond age of majority
- D. Statute of repose, § 893.40

3..... Monthly Income Available for Support (MIAFS)

- A. Subsistence allowance
- B. Child support standards apply to MIAFS
- C. Not considered income

4..... Support Determination

- A. Procedure in determining support
- B. DCF child support standard (see Wis. Admin. Code Ch DCF 150) presumptively mandatory
- C. Shared-placement support determination (See *infra* App. 5)
- D. Non-shared placement child support order (See *infra* App. 1)
- E. Serial family modification
- F. Split-placement support determination
- G. Low-income payers
- H. High-income payers

5..... Deviation from Child Support Standard—Shirking

- A. Deviation from standards (See *infra* App. 6)

- B. “Shirking” Defined (See *infra* App. 7)
- C. Shirking: Specific factors and situations
- 6..... Health-Care Component of Support
 - A. Ct must specifically assign responsibility for and manner of payment of child’s health-care expenses
 - B. Allocation of medical expense responsibility subject to modification upon substantial change of circumstances
- 7..... Security for Child Support; Insurance and Trusts
 - A. May require parent to make minor children beneficiaries of life insurance policies to secure support obligation
 - B. Support fund trusts
- 8..... Orders During Pendency of Action
 - A. Ct or CCC may require either or both parties to make support payments while action pending
 - B. Order may be based on written stipulation of parties
 - C. CCC orders reviewable by Ct
 - D. Temporary support pending appeal
 - E. Case closure order
- 9..... Stipulations
 - A. Parties may stipulate as to child support under § 767.34
 - B. Ct’s approval of stipulation under § 767.34
 - C. Judge-approved stipulated initial orders before judgment under § 767.333
 - D. Repudiation/Withdrawal
 - E. Enforcement/Estoppel
- 10..... Support Order
 - A. Determination of amount
 - B. Mandatory inclusions
 - C. Discretionary inclusions
- 11..... Enforcement
- 12..... Modifications
 - A. Upon stipulation or motion of either party, DCF, Cty Dept, or Cty CSA
 - B. Must show substantial change in circumstances
 - C. Ct’s authority
 - D. Case closure order
- 13..... Adjustments and Arrearages
 - A. Annual adjustments
 - B. Reconciliation; establishing arrearage by affidavit
 - C. Adjustment of arrearages
 - D. Ct can impose postjudgment trust out of support arrearages only if Ct finds trust in best interests of children
- 14..... Child Support Appendices Under Wis. Stat. § 767.511 & Wis. Admin. Code Ch DCF 150
- FA 11: QDROs
 - 1..... Plans Requiring a Qualified Domestic Relations Order (QDRO)
 - A. Generally

- B. Specific plans requiring a QDRO
- C. Wis Retirement System
- 2..... Plans That Do Not Require a QDRO but May Be Divided by a Domestic Relations Order (DRO)
 - A. Plans excluded under IRC minimum vesting standards
 - B. Plans excluded under ERISA § 4(b)
 - C. Plans excluded under ERISA § 201
- 3..... Governmental Plans
 - A. The following governmental plans include in their provisions method for dividing and distributing benefits
- 4..... Execution of QDRO
 - A. Inclusion of pension in property division divests owner of portion awarded to spouse
 - B. Former owner's discharge in bankruptcy does not affect portion of pension awarded to spouse
 - C. Former owner may still be required to execute a QDRO even though former owner had failed to do so before filing in bankruptcy
- 5..... Model QDRO
 - A. Judicial red flags and helpful hints noted on model QDRO, following
 - B. Definition of terms pursuant to Retirement Equity Act of 1984
 - C. Factual recitals and provisions regarding creation (and/or) assignment of retirement benefits
 - D. Covenants regarding non-alteration of benefits
 - E. Additional provisions regarding payment to be made to Alternate Payee before, on, or after Earliest Retirement Age or separation from service of participant, upon rollover of benefits into individual retirement account, or upon termination of plan
 - F. Death of Alternate Payee—provision for designation of beneficiary
 - G. Death of Participant and survivor benefits—provisions for treatment of former spouse of Participant as surviving spouse of Participant for purposes of qualified preretirement survivor annuity, qualified joint survivor annuity, and other survivor benefits
 - H. Disability of participant
 - I. Intended tax treatment of distributions or payments
 - J. Miscellaneous provisions
 - K. Determination as to qualification of Domestic Relations Order, notice to Participant and Alternate Payee, agreement to comply with Order and other relief

FA 12: ATTORNEY AND GUARDIAN AD LITEM FEES/EXPERT COSTS

- 1..... Atty Fees
 - A. Authority
 - B. Amount
 - C. Findings and order
 - D. Atty fees on contempt
 - E. Atty fees on appeal
 - F. State or Cty involvement
- 2..... Guardian ad Litem Fees
 - A. Ct may direct either or both parties to pay
 - B. If parties unable to pay, Ct may direct payment, in whole or in part, by Cty of venue

- C. Ct must approve amount of fees, both as to reasonableness and necessity
- D. On dismissal, substitution, or withdrawal of Atty, or vacation of judgment
- E. Ct may enforce orders by means of contempt power

3..... Costs of Experts

- A. May order either party to pay reasonable amount for cost to other party of maintaining or responding to action

FA 13: CUSTODY AND PHYSICAL PLACEMENT

1..... Jurisdiction

- A. Ct shall determine legal custody and physical placement of any minor child of the parties in the following actions
- B. Subject-matter jurisdiction
- C. Personal jurisdiction
- D. Service or notice

2..... Commencement of Action

- A. Parties
- B. Petition
- C. All other requirements for commencing action are same as in other actions affecting family

3..... Pretrial Matters

- A. Parenting plan
- B. Appointment of GAL
- C. Role of behavioral scientists
- D. Educational programs and classes
- E. Orders during pendency of action
- F. Stipulations

4..... Mediation/Arbitration

- A. Who may mediate
- B. What may be mediated
- C. When does mediation occur
- D. Initial session of mediation
- E. Mediator powers and duties
- F. Confidentiality of mediation
- G. Successful outcome of mediation
- H. If mediation is unsuccessful
- I. Ct may not order binding arbitration of custody issues

5..... Custody and Placement Study

- A. Counties must provide legal custody and physical placement study services
- B. Report of results of study must be submitted to Ct and parties at least 10 days before report is introduced into evidence
- C. Mediator may not conduct study UNLESS

6..... Hearing

- A. Procedure
- B. Initial determination of legal custody and periods of physical placement between parents

C. Criteria for transfer of legal custody to third party

7..... Judgment

- A. Legal custody options
- B. Legal custody to third party
- C. Physical placement when sole or joint legal custody awarded to parent
- D. Contents of final order if legal custody or physical placement contested
- E. Incidents of legal custody
- F. Rights of noncustodial parents include
- G. Parent denied physical placement may be denied access to
- H. Visitation or physical placement prohibited if parent kills other parent

8..... Enforcement of Orders

- A. Ct has authority to do all acts and things necessary and proper in action affecting the family to carry its orders and judgments into execution
- B. Problems with custody or placement referred to CCC for investigation
- C. Criminal sanctions
- D. Motion for enforcement
- E. For additional enforcement remedies, see FA 4 and FA 5, this volume

9..... Modification of Judgment

- A. Parties may stipulate to modification of an order of physical placement or legal custody at any time
- B. Procedure for seeking modification of custody/placement order
- C. Ct may not alter custody or physical placement order within 2 years after final judgment determining legal custody or physical placement, absent stipulation by parties, UNLESS
- D. Ct may alter custody or physical placement order after 2 years have passed since initial order
- E. Ct may deny parent physical placement rights at any time if Ct finds those rights would endanger child's physical, mental, or emotional health
- F. Modification of periods of physical placement for failure to exercise physical placement
- G. Ct shall deny physical placement for killing other parent
- H. If either party opposes modification or termination of a custody/placement order, Ct must state reasons for decision in writing
- I. Relocating a child's residence when both parents have physical placement rights
- J. Ct may not order a modification of custody to happen contingent on occurrence of an event or on a prospective finding unless it complies with § 767.41(5m). See Sec. 9.A.3, supra. But see Koeller v Koeller, 195 Wis. 2d 660 (Ct. App. 1995)
- K. Generally, Ct may not transfer physical placement right of parent to third party chosen by parent. However, during a parent's deployment, a temporary delegation of custodial responsibilities can be made via a temporary agreement between the parents or a temporary Ct order following a hearing
- L. A Juv/children's Ct Judge may enter an order regarding custody and placement in a family Ct action. The order has the same effect as an order issued by the family Ct Judge. It remains the order until the family Ct Judge modifies or terminates the order

10..... GAL Practice Guidelines

FA 14: VISITATION RIGHTS OF CERTAIN PERSONS

1..... Grandparental Visitation

- A. Visitation of marital children under § 767.43

B. Visitation of nonmarital children under § 767.43

C. Visitation under Ch 48

2..... Visitation by Other Persons

A. Who are other persons

B. Stepparent visitation under Ch 48

C. Other persons have standing to petition

D. A Juv/children's Ct Judge may enter an order regarding visitation in a family Ct action. The order has the same effect as an order issued by the family Ct Judge. It remains the order until the family Ct judge modifies or terminates the order

3..... Visitation Rights Affected by Homicide of Parent

A. Ct may not grant visitation rights to person convicted of 1st-degree intentional homicide or 2nd-degree intentional homicide of parent of child and conviction has not been reversed, set aside, or vacated

B. Ct shall deny existing visitation upon petition, motion, or order to show cause by parent or GAL, or upon Ct's own motion and upon notice to person granted visitation, if person convicted of 1st-degree intentional homicide or 2nd-degree intentional homicide of parent of child and conviction has not been reversed, set aside, or vacated

C. Sections A. and B., supra, do not apply if Ct determines by clear and convincing evidence that visitation would be in best interests of child

4..... Enforcement of Visitation Rights

A. Visitation rights under § 767.43 may be enforced by contempt under Chapter 785, except Ct may impose only § 785.04(1)(a) and (c) against contemnor

B. Ct may issue necessary orders to enforce privileges under § 48.9795(12)

FA 15: JURISDICTIONAL CONFLICTS (UCCJEA/PKPA/HAGUE CONVENTION)

1..... General Provisions

A. Ct must make four separate determinations under UCCJEA and PKPA

B. Child custody proceeding includes:

C. Child custody proceeding does not include:

D. Application to Indian tribes

E. International application

F. Notice to persons outside Wis

G. Calendar priority

H. Communication between courts

I. Cooperation between Cts

2..... Information to Be Submitted to Court in 1st Pleading or Affidavit

A. All parties must provide following sworn information in first pleading or attached affidavit

B. If information under Sec. A. above not furnished, Ct, upon motion of party or own motion, may stay proceeding until information furnished

C. Ct should review the affidavit to make sure Wis has jurisdiction to make an initial custody and placement determination

3..... Subject-Matter Jurisdiction for Initial Determination

A. Wis Ct has subject-matter jurisdiction over initial determination only when one of following grounds is present

B. Physical presence of, or personal jurisdiction over, party or child not necessary or sufficient to make custody determination

4..... Exclusive, Continuing Jurisdiction

A. Except in emergency—child is present in state and has been abandoned, or needs protection from maltreatment or abuse—Wis Ct has exclusive, continuing jurisdiction over custody determination if made consistent with the UCCJEA, until either 1) or 2) below occurs

B. Wis Ct that made custody determination and does not have exclusive, continuing jurisdiction under Sec. 4.A., above, may modify that determination only if it has jurisdiction to make initial determination, under Sec. 3 above

5..... Subject-Matter Jurisdiction to Modify Determination

A. Wis Ct has subject-matter jurisdiction to modify child custody determination of Ct of another state only if

B. Applies to custody determinations of foreign Cts

6..... Temporary Emergency Jurisdiction

A. Wis Ct has temporary emergency jurisdiction if child is present in Wis and child has been abandoned or it is necessary in emergency to protect child because child, sibling, or parent is subject to or threatened with mistreatment or abuse

7..... Full Faith and Credit Under PKPA

A. Wis Ct's order will be entitled to full faith and credit in other states under PKPA only if Ct has jurisdiction under Wis law and one of following conditions is met

8..... Proceedings Pending in Another State

A. Under UCCJEA, Wis Ct shall not exercise jurisdiction if custody proceeding was pending in Ct of another state at time petition was filed in Wis

B. Under PKPA, Wis Ct shall not exercise jurisdiction if custody proceeding commenced while proceeding pending in Ct of another state

9..... Declining Jurisdiction—Inconvenient Forum

A. Ct with jurisdiction may decline to exercise jurisdiction at any time upon finding

B. Ct shall consider whether it is appropriate for another state to exercise jurisdiction considering all relevant factors including

C. If Wis Ct finds it is inconvenient forum and Ct of another state is more appropriate forum, Wis Ct shall stay proceedings

D. Wis Ct may decline to exercise custody jurisdiction if custody determination incidental to action for divorce or other proceeding and retain jurisdiction over divorce or other proceeding

10..... Declining Jurisdiction by Reason of Conduct

A. If Wis Ct has jurisdiction under UCCJEA because person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, Ct shall decline to exercise jurisdiction for custody decree unless any of the following occurs:

B. If Wis Ct declines to exercise jurisdiction under Sec. A. above, it may fashion appropriate remedy to ensure child's safety and prevent repetition of unjustifiable conduct, including staying proceeding until custody proceeding commenced in Ct having jurisdiction

C. On dismissal or stay of proceeding, Ct may assess against party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, Atty fees, investigative fees, expenses for witnesses, travel expenses, and expenses for child care during course of proceeding, unless party establishes assessment would be clearly inappropriate

11..... Enforcement of Custody Determination

A. Wis Ct shall recognize and enforce custody determination of another state if

B. Wis Ct may enforce order for return of child made under Hague Convention on Civil Aspects of International Child Abduction as if it were a custody determination

C. Registration of custody determination

D. Wis Ct without jurisdiction to modify custody determination may issue temporary order enforcing

E. Enforcement of registered determination

F. Petition for Enforcement

G. Warrant to take physical custody of child

H. Hearing and Order

12..... Judicial Bench Cards for Hague Convention Cases

FA 16: PATERNITY

1..... Jurisdiction

A. Paternity may be determined as part of another action affecting the family, or as independent action

B. Personal jurisdiction

C. Child custody jurisdiction

D. Venue

2..... Commencement of Action

A. Persons entitled to initiate action or motion to establish paternity or rebut presumption under § 891.405, 891.407, or 891.41(1)

B. Statute of limitation

C. Summons

D. Notice

E. Petition

F. Service of pleadings

G. Agreements barring paternity action

H. Stay of action until birth

3..... Legal Representation

A. GAL must be appointed

B. GAL may be appointed for child in any paternity proceeding

C. Duties of GAL

D. Any party may be represented by counsel

E. Cty Bds must designate Atty to represent State under § 767.205(2)

F. Appointment of Atty for indigent respondent

4..... Respondent's First Court Appearance

A. Held no sooner than 30 days after service, unless parties agree to earlier date

B. Ct should ensure that parties with similar interests are joined as additional parties

C. Ct must inform parties

5..... Failure of Parties to Appear

A. Failure of petitioner to appear at pretrial or trial

B. Failure of respondent to appear when required

6..... Discovery, Evidence, Testimony

A. Civil rules of discovery (Ch 804) apply, except

B. "Another man" defense

C. Genetic tests

D. Records of past/pending paternity actions

E. Information in mother's AFDC/W-2 file

- F. Admissible evidence at trial and pretrial
- G. Witness duties and immunities
- 7..... Presumptions of Paternity
 - A. Male presumed to be child's father
 - B. Presumption is rebuttable
 - C. Burden of proof on respondent to overcome presumption
 - D. If no presumption of paternity, if paternity is conclusively determined under § 767.804(1), or if paternity is acknowledged under § 767.805(1)
- 8..... Artificial Insemination
 - A. Husband is child's father if woman was artificially inseminated
 - B. Donor of semen is not father and has no parental rights or liabilities
- 9..... Pretrial Hearing Procedures
 - A. Pretrial hearing is required
 - B. Ct shall evaluate probability of determining paternity at trial
 - C. Ct or Supplemental Ct Comm'r may dismiss action
 - D. Ct may recommend settlement
 - E. If party or GAL refuses to accept final recommendation, action must be set for trial
 - F. Whenever Ct finds it unlikely that all parties would accept a recommendation
 - G. No order or temporary order for child support, legal custody, or physical placement may be entered unless
 - H. Judgment may be entered based on statement acknowledging paternity signed and filed before April 1, 1998
- 10..... Trial
 - A. Closed to persons other than those necessary to the proceeding
 - B. Verbatim record must be made
 - C. Held in two separate parts
 - D. Determination of paternity
 - E. Support, legal custody, periods of physical placement, and related issues
 - F. Elements of a prima facie case in a paternity action
- 11..... Judgment
 - A. Determination of existence or nonexistence of paternity determinative for all purposes
 - B. Judgment/order must contain all the following
 - C. Payment of child's health-care expenses
 - D. Past support
 - E. Ct may order Atty for prevailing party to prepare findings of fact, conclusions of law, and judgment for Ct approval
- 12..... Relief from Judgment
 - A. Motion to reopen default judgment
 - B. Relief from judgment under Rules of Civil Procedure
 - C. Relief from judgment incorporating lump-sum child support settlement
- 13..... Revision of Judgment
 - A. Orders regarding support, legal custody, and periods of physical placement governed by same statutory provisions as in other actions affecting the family

B. Ct may revise, reopen paternity judgment

14..... Voluntary Acknowledgment of Paternity

- A. Acknowledgment of paternity
- B. Rescission of acknowledgment
- C. Actions and orders when paternity acknowledged
- D. Liability for past support
- E. Voiding determination

15..... Grandparental Liability Law

- A. Grandparents liable to support the children of their dependent children

FA 17: ABUSE/HARASSMENT

1..... Domestic Abuse

- A. TRO and injunction available to adult family or adult household member who is victim of actual or threatened domestic abuse
- B. “Domestic abuse”
- C. Jurisdiction
- D. Commencement of action and response
- E. Temporary Restraining Order (TRO)—Domestic abuse
- F. Injunction hearing—Domestic abuse
- G. Stipulation
- H. Enforcement of orders
- I. New Hearing

2..... Child Abuse

- A. TRO and injunction available to prohibit contact between victim of child abuse and abuser
- B. “Child.” Person under 18 years of age
- C. “Abuse”
- D. Jurisdiction
- E. Commencement of action or response
- F. Petition
- G. Temporary Restraining Order—Child abuse
- H. Injunction hearing—Child abuse
- I. New Hearing
- J. Penalty
- K. Record

3..... Individuals at Risk

- A. TRO and injunction available
- B. “Individuals at risk” defined as either
- C. Other definitions under § 813.123
- D. Jurisdiction
- E. Commencement of action and response

F. Petition

G. General Procedure

H. Temporary Restraining Order—Individual at Risk

I. Injunction Hearing—Individuals at Risk

J. New Hearing

K. Enforcement of Orders

4..... Harassment

A. TRO and injunction are available to persons being harassed or intimidated

B. “Harassment.” Definition parallels definition of criminal harassment, except that § 947.013 specifically excludes lawful conduct in labor disputes and does not list conduct included in para. 2) below. Sec. 813.125(1)(am)4. includes the following acts or threatening to do the same

C. Jurisdiction

D. Commencement of action

E. Petition

F. Guardian ad Litem

G. Two-Part Procedure

H. Temporary Restraining Order—Harassment

I. Injunction hearing—Harassment

J. New Hearing

K. Enforcement of orders

5..... Notice and Process for Firearm Surrender

A. Applies to injunctions issued as follows:

B. Surrender and extend order

C. If Ct required to extend TRO under § 813.1285, and TRO not previously granted, Ct on own motion, shall reconsider and grant TRO

D. Firearm possession determination

E. Surrender of firearms

F. Hearing to surrender firearms

G. Penalties

6..... Interstate Enforcement of Protection Orders

A. Protection orders entitled to full faith and credit

B. Definitions

C. Requirements

D. General rules

FA 18: LEGAL SEPARATION AND ANNULMENTS

LEGAL SEPARATION

1..... Requirements

A. Action for legal separation has same requirements as action for divorce EXCEPT

B. Residence

2..... Petition

- A. Contents of petition
- B. Power of Ct when petition for legal separation

3..... Judgment

- A. Judgment of legal separation
- B. Findings of judgment

ANNULMENTS

1..... Jurisdiction

- A. Residence
- B. Personal jurisdiction
- C. Quasi in rem jurisdiction
- D. Child custody jurisdiction

2..... Service, Commencement of Action, Pretrial Matters

- A. Same as in divorce or legal separation actions
- B. See Contested Divorce, FA 2

3..... Grounds for Annulment

- A. Very short marriage is not grounds in itself for an annulment
- B. Lack of capacity to consent to marriage at time solemnized
- C. Marriage induced by force, duress, or fraud involving essentials of marriage
- D. Lack of physical capacity to consummate marriage
- E. Party was age 16 or 17 and married without consent of parent or guardian or judicial approval, or was under age 16
- F. Marriage prohibited by law
- G. No annulment permitted after death of either party to marriage

4..... Trial

- A. Appearance of parties
- B. Trial procedure
- C. Matters to be proved at trial
- D. Evidence presented at trial

5..... Stipulations

- A. See Stipulated Divorce, FA 1
- B. Consider approval of stipulations
- C. Stipulations are recommendation of parties, not binding on Ct
- D. Child custody and physical placement stipulations
- E. Financial matters stipulations
- F. Ct may modify stipulation in interest of justice
- G. If either party repudiates stipulation before or during trial, must set case for trial as contested proceeding

6..... Findings

- A. Determine that jurisdictional and residence requirements have been met
- B. Determine whether grounds for annulment have been proved
- C. Grant or deny annulment

D. Determine related matters (See Findings in Contested Divorce, FA 2, Sec. 8)

7..... Judgment

- A. Direct moving party to draft findings of fact and conclusions of law, and written judgment
- B. Warnings that must appear in judgment
- C. TPR warning
- D. Effect of annulment

FA 19: OTHER ACTIONS

1..... Action to Affirm Marriage

- A. May be commenced
- B. Residence, jurisdiction
- C. Procedures and grounds
- D. Judgment

2..... Recognition of Putative Marriage

- A. Void or voidable marriage solemnized in proper form and celebrated in good faith by one or both parties shall have legal effect of valid marriage as long as recognition would not violate public policy

3..... Foreign Judgments

- A. State Cts are to recognize foreign divorces and orders. Full faith and credit given to other states' judgments in actions affecting family
- B. No full faith and credit given to other states' judgments in divorce proceeding when
- C. Full faith and credit does not apply to child custody proceedings
- D. Judgments of Cts of foreign countries may be recognized
- E. Under "divisible divorce" doctrine, if another state grants judgment of divorce but does not provide for maintenance or property division, full faith and credit applies to divorce only

4..... Action to Compel Maintenance or Support

- A. If person fails or refuses to provide for support or maintenance for the person's spouse or minor child, action may be initiated by
- B. No filing fee to be charged
- C. Title of action is "In re Support or Maintenance of..."
- D. Ct shall determine amount person should reasonably pay
- E. Order may be changed or modified by Ct on notice of motion or order to show cause by either party on sufficient evidence
- F. Enforcement by contempt, assignment of income under § 767.76, or other enforcement mechanisms of § 767.77

5..... Actions for Interspousal Remedies

- A. Relationship with action affecting the family
- B. Breach of duty of good faith resulting in damage to marital property or claimant spouse's individual property
- C. Action for classification of property or accounting of spouses' property and obligations
- D. Action to have name of spouse added to marital property or to document evidencing ownership of marital property held in name of other spouse alone
- E. Marital property has been or is likely to be substantially injured by other spouse's gross mismanagement, waste or absence

F. Marital property has been used to satisfy obligation other than one arising from duty to support spouse or child of marriage or one in interest of marriage or family

G. Gift of marital property made during marriage that does not comply with § 766.53

6..... Surrogacy/Parentage/Assisted Reproduction Technology

FA 20: SELF-REPRESENTED PARTIES

1..... Sample Script: Questions for Parties

2..... Sample Script: Granting the Divorce

Wisconsin Judicial Benchbook Volume III: Family

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IN MEMORIAM

RONNI G. JONES

April 12, 1941—November 7, 2002

The Wisconsin Judicial Benchbooks have borne the imprint of their Project Editor, Ronni Jones, since 1988 when Ronni first assumed this task for the Office of Judicial Education. In that time, the judges and lawyers of this state have benefited from her focused dedication to the creation and maintenance of a useful, practical resource for Wisconsin's trial judges. And those of us who had the good fortune to know and to work with Ronni have benefited from the friendship and collegiality of this vibrant, witty, and generous woman.

Ronni brought to her work a fierce intelligence and a logical and discerning approach to solving problems. Along with it came a marvelous sense of humor and a dry wit served up with a trace of a Brooklyn accent. Ronni was the genuine article. It was fun to see her discuss a case or a legal issue with a group. She was energized by the intellectual discussion, but always with a purpose; she unfailingly kept her eye on the practical goal of how the end product could be used to assist judges.

Ronni's commitment to judicial education is perhaps not surprising. When she entered law school at the age of 42, she had already combined raising a family with a history of work in training and education, and a track record of

commitment to volunteerism and public service. She was married for 40 years to P. Charles Jones, a bright and thoughtful Dane County judge who was himself a longtime member of the Civil Benchbook Committee. And she loved a challenge.

Warmth and humor infused Ronni's relationships with the people she knew and worked with. She was gracious and unpretentious, encouraging and delighting in conversation whether around the conference table or the dinner table. She was a facilitator in the best sense of the word; she wanted to include everyone in the discussion or in the gathering or in the party.

Ronni loved her work but more so the abiding friendships developed in the course of her work. We remember her with gratitude as a judicial educator who helped to make us better judges. And we remember her with fondness as a friend who, along the way, helped to make us better people.

The Wisconsin Judicial Benchbook Editorial Committees

April 15, 2003

SUMMARY TABLE OF CONTENTS

FAMILY

Divorce

- [FA 1. Stipulated Divorce](#)
- [FA 2. Contested Divorce](#)
- [FA 3. Alternative Dispute Resolution \(ADR\) in Family Cases](#)
- [FA 4. Use of Contempt](#)
- [FA 5. Other Enforcement](#)
- [FA 6. Uniform Interstate Family Support Act \(UIFSA\)](#)

Financial Matters

- [FA 7. Tax Checklist](#)
- [FA 8. Property Division](#)
- [FA 9. Maintenance](#)
- [FA 10. Child Support](#)
- [FA 11. QDROs](#)
- [FA 12. Attorney and Guardian ad Litem Fees/Expert Costs](#)

Children's Issues

- [FA 13. Custody and Physical Placement](#)
- [FA 14. Visitation Rights of Certain Persons](#)
- [FA 15. Jurisdictional Conflicts \(UCCJEA/PKPA/Hague Convention\)](#)
- [FA 16. Paternity](#)

Miscellaneous Actions

- [FA 17. Abuse/Harassment](#)
- [FA 18. Legal Separation and Annulments](#)

[FA 19. Other Actions](#)**Recurring Issues**[FA 20. Self-Represented Parties](#)**Benchbook: Master Index**

For online access to a master index of topics discussed in the Wisconsin Judicial Benchbooks, please go to <https://booksunbound.wisbar.org/w/wisbar/AE0025-MASTER.INDEX>.

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*State Bar of Wisconsin***USER’S GUIDE AND ABBREVIATIONS**

The Wisconsin Judicial Benchbooks are unique legal publications, designed as highly functional practice aids. Standard rules of sentence and punctuation have been modified to accommodate the terse outline style used throughout. Easy access to the text can be achieved in three ways: (1) through the comprehensive Table of Contents at the beginning of each volume, (2) through the Major and Minor Subject Tab System, and (3) through the Table of Contents at the beginning of each Minor Subject Tab.

Citations have been placed in the left margin, corresponding to the block of text for which they are authority. While every effort has been made to ensure that the citations of authority are accurate and the suggested procedures are appropriate, the Benchbooks (as any practice aid) must be used with caution. **THE USER IS ADVISED TO CONSTANTLY TEST THE BENCHBOOK’S CITATIONS AND SUGGESTED PROCEDURES AGAINST THE USER’S CONTINUING ORIGINAL RESEARCH, EXPERIENCE, AND COMMON SENSE.**

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committee members are suggesting that the proposition presented is appropriate in the absence of binding authority. In NO instance should the user assume that text cited to either “Recommendation” or “Comment” is legally correct.

Citation Abbreviations

A2d	Atlantic Reporter, 2nd series
ABA Stds	American Bar Association Standards
ALR	American Law Reports
ALR2d	American Law Reports, 2nd series
ALR3d	American Law Reports, 3rd series
ALR4th	American Law Reports, 4th series
Am Jur	American Jurisprudence
Am Jur 2d	American Jurisprudence, 2nd series
CJ	Corpus Juris
CJS	Corpus Juris Secundum
Const	Constitution
Cr L	Criminal Law Reporter
F	Federal Reporter
F2d	Federal Reporter, 2nd series
FRCP	Federal Rules of Civil Procedure
FRCP	Federal Rules of Criminal Procedure
FS	Federal Supplement
IRC	Internal Revenue Code
LEd2d	Lawyers Edition, 2nd series
OAG	Attorney General Opinion
P2d	Pacific Reporter, 2nd series
Pin	Pinney’s Wisconsin Reports
RMC	Records Management Committee
SCR	Wisconsin Supreme Court Rules
St	State
SW2d	South Western Reporter, 2nd series
USC	United States Code
USCA	United States Code Annotated
Wis Adm Code	Wisconsin Administrative Code
Wis JI-Cr	Wisconsin Jury Instructions, Criminal
Wis JI-Cr, SM	Wisconsin Jury Instructions, Criminal, Special Materials
Wis JI-Cv	Wisconsin Jury Instructions, Civil

Note: At times, the user will encounter citations that include abbreviations other than those listed above. The Benchbook format restricts printing the full, unabbreviated names. We regret any inconvenience this may cause, but we are confident that in most instances, the abbreviations are self-evident.

Text Abbreviations

AG	Attorney General
AOD	Alcohol and Other Drugs
AODA	Alcohol and Other Drugs Abuse
Asst	Assistant
Atty	Attorney
AV	Audiovisual
Bd	Board
Ch	Chapter
CHIPS	Child in Need of Protection or Services
CMV	Commercial Motor Vehicle
Co	Company
Comm’r	Commissioner
Corp	Corporation
CSA	Child Support Agency
Ct	Court

Cty	County
DA	District Attorney
DCF	Department of Children and Families
Def	Defendant
Dept	Department
DHS	Department of Health Services
DL	Driver's License
DOA	Department of Administration
DOC	Department of Corrections
DOT	Department of Transportation
DWD	Department of Workforce Development (formerly DILHR)
FCC	Family Court Commissioner
GAL	Guardian ad Litem
Gdnshp	Guardianship
ICJ	Interstate Compact on Juveniles
ICPC	Interstate Compact on the Placement of Children
ICWA	Indian Child Welfare Act
Ins	Insurance
Juv	Juvenile
PD, SPD	State Public Defender
Prelim	Preliminary Hearing, Preliminary Examination
PSI	Presentence Investigation, Presentence Report
S	State
Std	Standard
TPR	Termination of Parental Rights
UCCJEA	Uniform Child Custody Jurisdiction and Enforcement Act
UIFSA	Uniform Interstate Family Support Act
US	United States
Wis	Wisconsin

TABLE OF CONTENTS

Volume III: Family

	Page
<u>FA 1 Stipulated Divorce</u>	
1. Default Checklist and Sample Findings.....	FA 1-1
2. Jurisdiction.....	FA 1-6
3. Initiation of Action.....	FA 1-7
4. Hearing.....	FA 1-10
5. Judgment.....	FA 1-16
<u>FA 2 Contested Divorce</u>	
1. Jurisdiction.....	FA 2-1
2. Initiation of Action.....	FA 2-1
3. Pretrial Matters.....	FA 2-6
4. Temporary Orders.....	FA 2-9
5. Suspension to Effect Reconciliation.....	FA 2-11
6. Trial.....	FA 2-12

7. Stipulations in Contested Trials..... FA 2-16
8. Findings, Judgment, and Warnings..... FA 2-18
9. Written Findings of Fact and Conclusions of Law..... FA 2-22
10. Changes in Judgment..... FA 2-22

FA 3 Alternative Dispute Resolution (ADR) in Family Cases

1. Types of ADR Methods Available in Family Cases..... FA 3-1
2. ADR Referrals by the Judge..... FA 3-2
3. Mediation Referrals..... FA 3-2
4. Binding Arbitration..... FA 3-5
5. Referee..... FA 3-8
6. Admissibility..... FA 3-8

FA 4 Use of Contempt

1. Contempt Generally..... FA 4-1
2. Authority, Purpose, and Extent..... FA 4-1
3. Time Considerations..... FA 4-2
4. Initiation of Contempt Proceedings..... FA 4-3
5. Hearing Required..... FA 4-4
6. Sanctions and Alternative Purge Conditions..... FA 4-6
7. Findings and Order..... FA 4-7
8. Violation of Purge Conditions..... FA 4-8
9. Bankruptcy as a Defense..... FA 4-8
10. Appeal..... FA 4-11

FA 5 Other Enforcement

1. General Authority..... FA 5-1
2. Judicial Enforcement Remedies..... FA 5-2
3. Assignment (Income Withholding)..... FA 5-4
4. Interception of Federal and State Tax Refunds..... FA 5-7
5. Judicial Review of Administrative Remedies..... FA 5-8
6. Summary of Administrative Remedies..... FA 5-14

FA 6 Uniform Interstate Family Support Act (UIFSA)

1. General Provisions..... FA 6-1
2. Jurisdiction..... FA 6-3
3. Direct Enforcement..... FA 6-7
4. Petition for Enforcement..... FA 6-8
5. Petitions to Establish Support Obligation or Determine Parentage..... FA 6-13
6. Registered Support Orders..... FA 6-14

7. Interstate Rendition (Extradition)..... FA 6-19
8. Judicial Bench Cards for UIFSA Cases..... FA 6-19
9. Orders Under UIFSA Flowchart..... FA 6-19

FA 7 Tax Checklist

1. Property Division..... FA 7-1
2. Maintenance..... FA 7-2
3. Child Support..... FA 7-3
4. Bankruptcy..... FA 7-5
5. Tax Calculations..... FA 7-6

FA 8 Property Division

1. Prenuptial and Postnuptial Marital Property Agreements..... FA 8-1
2. Disclosure of Assets and Liabilities..... FA 8-2
3. Marital Estate..... FA 8-4
4. Nonmarital Estate..... FA 8-7
5. Valuation of Property..... FA 8-11
6. Division of Marital Assets..... FA 8-20
7. Depletion, Waste, or Fraudulent Transfer of Marital Assets..... FA 8-26
8. Findings, Conclusions, Judgment, and Order..... FA 8-28
9. Continuing Jurisdiction on Death of Party..... FA 8-32
10. Modification and Relief from Judgment..... FA 8-32

FA 9 Maintenance

1. Purposes..... FA 9-1
2. Determination of Amount of Maintenance..... FA 9-2
3. Determination of Term of Maintenance..... FA 9-7
4. Orders During Pendency of Action Under § 767.225..... FA 9-8
5. Judge-Approved Stipulated Initial Orders Before Judgment Under § 767.333..... FA 9-10
6. Court-Approved Stipulations Under § 767.34..... FA 9-10
7. Findings, Conclusions, and Order..... FA 9-12
8. Revision and Modification of Final Orders and Judgments..... FA 9-13
9. Termination/Vacation of Order..... FA 9-19
10. Shirking..... FA 9-20

FA 10 Child Support

1. Purposes..... FA 10-1

2.	Who Is Liable.....	FA 10-1
3.	Monthly Income Available for Support (MIAFS).....	FA 10-4
4.	Support Determination.....	FA 10-9
5.	Deviation from Child Support Standard—Shirking.....	FA 10-16
6.	Health-Care Component of Support.....	FA 10-20
7.	Security for Child Support; Insurance and Trusts.....	FA 10-21
8.	Orders During Pendency of Action.....	FA 10-23
9.	Stipulations.....	FA 10-24
10.	Support Order.....	FA 10-28
11.	Enforcement.....	FA 10-31
12.	Modifications.....	FA 10-31
13.	Adjustments and Arrearages.....	FA 10-35
14.	Child Support Appendices Under Wis. Stat. § 767.511 & Wis Admin Code ch. DCF 150.....	FA 10-40

FA 11 QDROs

1.	Plans Requiring a Qualified Domestic Relations Order (QDRO).....	FA 11-1
2.	Plans That Do Not Require a QDRO but May Be Divided by a Domestic Relations Order (DRO).....	FA 11-2
3.	Governmental Plans.....	FA 11-4
4.	Execution of QDRO.....	FA 11-4
5.	Model QDRO.....	FA 11-5

FA 12 Attorney and Guardian ad Litem Fees/Expert Costs

1.	Atty Fees.....	FA 12-1
2.	Guardian ad Litem Fees.....	FA 12-6
3.	Costs of Experts.....	FA 12-7

FA 13 Custody and Physical Placement

1.	Jurisdiction.....	FA 13-1
2.	Commencement of Action.....	FA 13-3
3.	Pretrial Matters.....	FA 13-5
4.	Mediation/Arbitration.....	FA 13-15
5.	Custody and Placement Study.....	FA 13-20
6.	Hearing.....	FA 13-22
7.	Judgment.....	FA 13-27
8.	Enforcement of Orders.....	FA 13-36
9.	Modification of Judgment.....	FA 13-39
10.	GAL Practice Guidelines.....	FA 13-49

FA 14 Visitation Rights of Certain Persons

1. Grandparental Visitation..... FA 14-1
2. Visitation by Other Persons..... FA 14-4
3. Visitation Rights Affected by Homicide of Parent..... FA 14-7
4. Enforcement of Visitation Rights..... FA 14-7

FA 15 Jurisdictional Conflicts (UCCJEA/PKPA/Hague Convention)

1. General Provisions..... FA 15-1
2. Information to Be Submitted to Court in 1st Pleading or Affidavit..... FA 15-5
3. Subject-Matter Jurisdiction for Initial Determination..... FA 15-6
4. Exclusive, Continuing Jurisdiction..... FA 15-8
5. Subject-Matter Jurisdiction to Modify Determination..... FA 15-8
6. Temporary Emergency Jurisdiction..... FA 15-9
7. Full Faith and Credit Under PKPA..... FA 15-10
8. Proceedings Pending in Another State..... FA 15-11
9. Declining Jurisdiction—Inconvenient Forum..... FA 15-13
10. Declining Jurisdiction by Reason of Conduct..... FA 15-14
11. Enforcement of Custody Determination..... FA 15-15
12. Judicial Bench Cards for Hague Convention Cases..... FA 15-23

FA 16 Paternity

1. Jurisdiction..... FA 16-1
2. Commencement of Action..... FA 16-3
3. Legal Representation..... FA 16-10
4. Respondent's First Court Appearance..... FA 16-13
5. Failure of Parties to Appear..... FA 16-15
6. Discovery, Evidence, Testimony..... FA 16-17
7. Presumptions of Paternity..... FA 16-23
8. Artificial Insemination..... FA 16-25
9. Pretrial Hearing Procedures..... FA 16-26
10. Trial..... FA 16-29
11. Judgment..... FA 16-32
12. Relief from Judgment..... FA 16-37
13. Revision of Judgment..... FA 16-38
14. Voluntary Acknowledgment of Paternity..... FA 16-39
15. Grandparental Liability Law..... FA 16-42

FA 17 Abuse/Harassment

1. Domestic Abuse..... FA 17-1
2. Child Abuse..... FA 17-18

3. Individuals at Risk..... FA 17-30
4. Harassment..... FA 17-45
5. Notice and Process for Firearm Surrender..... FA 17-58
6. Interstate Enforcement of Protection Orders..... FA 17-64

FA 18 Legal Separation and Annulments

Legal Separation

1. Requirements..... FA 18-1
2. Petition..... FA 18-2
3. Judgment..... FA 18-3

Annulments

1. Jurisdiction..... FA 18-4
2. Service, Commencement of Action, Pretrial Matters..... FA 18-5
3. Grounds for Annulment..... FA 18-5
4. Trial..... FA 18-9
5. Stipulations..... FA 18-12
6. Findings..... FA 18-14
7. Judgment..... FA 18-15

FA 19 Other Actions

1. Action to Affirm Marriage..... FA 19-1
2. Recognition of Putative Marriage..... FA 19-2
3. Foreign Judgments..... FA 19-2
4. Action to Compel Maintenance or Support..... FA 19-3
5. Actions for Interspousal Remedies..... FA 19-5
6. Surrogacy/Parentage/Assisted Reproduction Technology... FA 19-11

FA 20 Self-Represented Parties

1. Sample Script: Questions for Parties..... FA 20-3
2. Sample Script: Granting the Divorce..... FA 20-6

FA 1: STIPULATED DIVORCE

1. Default Checklist and Sample Findings

A. Before case is called, clerk/Judge to establish that the following documents are in Ct file

- 1) Summons and petition, including custody information required in [§ 822.29](#)

- 2) Financial declaration for both (if respondent served)
- 3) Certificate of compliance
- 4) Vital statistics form
- 5) Written stipulation
- 6) If only one party in Ct, order of appearance (unless joint petition)

B. After witness is sworn, the following preliminary questions should be asked

Recommendation

Note: If there are self-represented parties, the questions in chapter [FA 20](#), *infra*, are recommended.

_____ Date of marriage

_____ Any children

_____ Date of birth of children

_____ How long separated if separated

Wife Husb

_____ Pregnant today

_____ _____ Name

Wife Husb

_____ _____ Address

_____ _____ Venue and jurisdiction

_____ _____ Date of birth

_____	_____	Social Security number	
_____	_____	Employment	
_____	_____	Financial declaration accurate re	salary and other items
_____	_____	Any welfare to family since case agency must be notified)	inception (If recipient, child support
_____	_____	Other marriages	
_____	_____	Other divorce actions	
_____	_____	Grounds for divorce (irretrievably	broken)

C. Stipulated divorce hearing—if no children

1) Questions for parties

a. Information in petition or joint petition

- True and accurate when filed
- True and accurate now

b. Marriage irretrievably broken

c. Pregnant (wife only)

d. Financial disclosure statement

- Have parties identify
- Accurately represents

— Income

— Assets

— Debts

— Any changes since filed

e. Marital Settlement Agreement

- Have parties identify
- Dispose of all property and debt
- Understand finality
- Maintenance

— Finality

— Ability to support self

- Fair under circumstances

f. Former surname

2) Granting divorce

a. Make necessary findings:

- Marriage irretrievably broken
- Incomes per financial disclosure statements
- Maintenance waiver fair
- Property division fair

b. Accept marital property agreement

- c. Restore former surname

§_767.35(3)

§_765.03(2)

- d. Give 6-month remarriage warning

D. Stipulated divorce hearing—if minor children

1) Questions for parties

- a. Information in petition or joint petition

- True and accurate when filed
- True and accurate now

- b. Marriage irretrievably broken

- c. Pregnant (wife only)

- d. Financial disclosure statement

- Have parties identify
- Accurately represents

— Income

— Assets

— Debts

— Any changes since filed

- e. Marital Settlement Agreement

- Have parties identify
- Child custody and placement in child(ren)'s best interest

- Child support analysis
- Health insurance coverage
- Dispose of all property and debt
- Understand finality
- Maintenance

— Finality

— Ability to support self

— Fair under circumstances

f. Former surname

2) Granting divorce

a. Make necessary findings:

- Marriage irretrievably broken
- Incomes per financial disclosure statements
- Custody and physical placement in child(ren)'s best interests
- Child support
 - Follows guidelines
 - Deviates from guidelines (state reasons)
- Maintenance waiver fair

- Property division fair
- b. Accept marital settlement agreement
 - c. Restore former surname
 - d. Give 6-month remarriage warning

2. Jurisdiction

§_767.301

A. Residence

- 1) To bring divorce, at least one party must be a bona fide resident of State for at least six months and one party must be at least 30-day resident of Cty immediately preceding commencement of action

§_767.01(2m)

§_822.21

B. Child custody jurisdiction

- 1) If child custody to be determined, additional jurisdictional requirements of Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) govern

- a. See [FA 15](#) for requirements

§_822.29

- 2) Every party in custody proceeding must file affidavit stating child's present address, where lived past five years, with whom lived, etc.

- a. Information can be in initial pleading

Recommendation

- b. If not in file, require parties to file affidavit before proceeding

§_801.05, §_801.06

Bushelman v Bushelman

[2001 WI App 124](#)

[246 Wis. 2d 317](#)

C. Personal jurisdiction

- 1) Respondent present or domiciled in State when served, or personally served and resided in State in marital relationship with petitioner for at least 6 consecutive months in 6 preceding years, or

§_801.06

- 2) Respondent makes general appearance without raising defense of lack of personal jurisdiction

*Mendez v
Hernandez-Mendez*
[213 Wis.2d 217](#)
(Ct. App. 1997)

- 3) Must have valid service upon foreign resident

[§_801.07\(5\)](#)

D. Quasi in rem jurisdiction

- 1) Sufficient for marital status questions only

- a. Not sufficient jurisdiction for determination of child custody and physical placement, or for financial matters except property located in Wis

[§_801.07\(5\)](#)

- b. Ct need not have grounds for personal jurisdiction under [§_801.05](#)

[§_801.11\(1\)](#)

- 2) Respondent must be served in accordance with Rules of Civil Procedure

[§_767.301](#)

- 3) One party must be at least 6-month resident of State and one party must be at least 30-day resident of Cty immediately preceding commencement of action

3. Initiation of Action

[§_767.215\(1\)](#)

A. Either or both parties to marriage can initiate divorce action

[§_767.205\(2\)](#)

- 1) State must be served if State is real party in interest—for example, in cases when AFDC, W-2, or Medical Assistance is provided to family member or in paternity cases whenever there is completed application for legal services filed with Child Support Agency (CSA)

Obergefell v Hodges
[135 S. Ct. 2584](#) (2015)

- 2) The 14th Amendment requires that the various states recognize same-sex marriages that have been licensed and validly performed in another state

[§_801.11](#), [§_767.215\(3\)](#)

B. Summons

- 1) Service of summons and petition must be in accordance with Rules of Civil Procedure

[§_767.215\(3\)](#)

- 2) If joint petition, summons not required

[§_767.215\(2m\)](#)

- 3) If one party initiates action and parties have minor children, service of summons must

- a. Include notification of information available from Office of FCC under §_767.105(2)
- b. Include notice of contents of parental interference with custody law, §_948.31, and
- c. Be accompanied by document setting forth standards and factors for determining child support, §_767.511(1m)
- d. Be accompanied by copy of §_767.41(1m) or by Cty's standard parenting plan form
- e. Be served on CSA if either party is the recipient of aid

§_767.217

§_767.215(3)

- 4) Response, if any, must be served on petitioner within 20 days after date summons served

C. Petition

§_767.215(2)

- 1) Contents outlined in statute
- 2) May be filed jointly

§_767.117

D. Prohibitions upon commencement of action

- 1) Prohibited acts are
 - a. Harassing, intimidating, physically abusing, or imposing any restraint on personal liberty of other party or minor child of either party
 - b. If action is under §_767.001(1)(a), (b), (c), (d), (h), or (i), encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of property owned by either or both parties without consent of other party or order of Ct, except
 - In usual course of business
 - In order to secure necessities, or
 - In order to pay reasonable costs and expenses of the action, including Atty fees
 - c. Unless action is under §_767.001(1)(g) or (h), without consent of other party or an order of Ct or CCC
 - Relocating and establishing a residence with minor child of parties more than 100 miles from residence of other party

§_767.117(1)(c)

- Removing minor child of parties from Wis for more than 90 consecutive days, or
 - Concealing minor child of parties from other party
- 2) Prohibitions apply until action dismissed, final judgment entered, or Ct or CCC orders otherwise
 - 3) Except as provided below, party who violates any provision may be proceeding against under [Ch 785](#) for contempt

Act in violation is not a contempt if Ct finds action taken to protect party or minor child of parties from physical abuse by other party and no reasonable opportunity under the circumstances for party to obtain order authorizing action

4. Hearing

[§_767.235\(2\)](#)

A. Appearances

- 1) Both parties required unless
 - a. Nonresidence is shown by competent evidence
 - b. Service by publication, or
 - c. Ct otherwise orders based on good cause—e.g., party is incapacitated
- 2) Order for appearance, if required, must be obtained by moving party and served on nonmoving party before final hearing or trial

Not required with joint petition

- 3) See Servicemembers Civil Relief Act in **Contested Divorce**, [FA 2](#), for special rules regarding appearance of those in military service

[§_767.335](#)

B. Determine that residence and jurisdictional requirements are present (120-day waiting period)

With certain findings, 120-day period can be waived by Ct order

C. Determine that proper service and notice given

D. Determine that vital statistics form submitted by parties**E. Determine whether grounds for divorce**

§_767.315(2)

- 1) Both parties by petition or otherwise must state under oath or affirmation that marriage is irretrievably broken, or

§_767.315(1)(a)

- 2) Both parties must have voluntarily lived apart continuously for 12 months preceding action and one party must so state, or

§_767.315(1)(b)

- 3) If parties have not voluntarily lived apart for 12 months preceding action and if only one party states marriage is irretrievably broken, Ct shall consider all relevant factors including circumstances giving rise to filing of petition and the prospect of reconciliation

§_767.315(1)(b)2.

- 4) If Ct finds a reasonable prospect of reconciliation exists

- a. Shall continue the matter for 30–60 days

- b. May suggest or order that parties seek counseling

- c. At adjourned hearing, determine whether marriage is irretrievably broken

§_767.127(1), (1m)

F. Review financial disclosure statements of the parties

- 1) If children involved, ensure that information on health insurance is included

G. Read stipulation (See Checklist at beginning of chapter)*Miner v Miner*[10 Wis. 2d 438](#) (1960)

- 1) Examine parties to determine whether they fairly and voluntarily entered into stipulation
- 2) Determine whether stipulation fair and reasonable and incorporate it as part of judgment

Hottenroth v Hetsko[2006 WI App 249](#),

¶¶ 22–30

[298 Wis. 2d 200](#)

Once Ct approves stipulation, parties can no longer withdraw it as matter of right, regardless of when written judgment entered

§_767.34, §_767.511

H. Child support

- 1) Ct may not approve stipulation for child support unless it provides for payment of child support determined in manner consistent with [§ 67.511](#)

See Motte v Motte
[2007 WI App 111](#)
[300 Wis. 2d 621](#)

Reference stipulation to nonmodifiable child support, see [FA 10, Sec. 9.B.3](#).

- 2) Child support amount may be expressed as percentage of income or as fixed sum

[§ 767.34\(2\)\(am\)](#)

- a. May only be expressed as percentage if

- Parties stipulated to use percentage, and
- State not a real party in interest, and
- Payer not subject to any other order in any other action for payment of child or family support or maintenance, and
- All payment obligations included in support order, other than annual disbursement fee, are expressed as percentage of payer's income

[§ 767.511\(1j\), \(1m\)](#)

- 3) Child support must be set in accordance with percentage of income standard unless Ct determines that use of percentage standard unfair to child or to any of parties

[§ 767.511\(1n\)](#)

- 4) If percentage standard not used

- a. Ct must calculate actual percentage order, and
- b. Ct must state reasons in record why standard is unfair and its rationale

[§ 767.511\(1\)\(b\)](#)

- 5) Determine which parent to receive tax exemption for child. Tax exemptions still need to be allocated for utilization of the child tax credit. The method for allocating the exemption is to require the party not claiming the exemption to execute IRS Form 8332

[§ 767.513\(2\)](#)

- 6) Ct must assign responsibility for child's health-care expenses

- 7) See **Child Support**, [FA 10](#)

[§ 767.34](#)

I. Child legal custody and periods of physical placement

1) Ct may approve or reject stipulation based on best interest of child

[§_767.405\(12\)](#)

2) If stipulation is result of mediation agreement, Ct must ensure that

- a. Attys for each party (if any) and GAL if appointed have reviewed it
- b. Mediator has certified that agreement accurately reflects agreement made between the parties
- c. If Ct rejects mediated agreement, must state reasons in writing

3) If stipulation reached without mediation

Comment

[§_767.41](#)

- a. Ct should make record establishing child's best interest
- b. Review parents' understanding of terms
- c. Determine whether agreement is just and reasonable

4) See **Custody/Placement**, [FA 13](#)

Miner v Miner

[10 Wis. 2d 438](#) (1960)

J. Review financial matters in stipulation carefully, against background of full information on parties' economic status and resources

1) [Sec. 767.127](#) requires the filing of financial declarations

Recommendation

Ct should make record at time of divorce of parties' income to establish baseline for future modification motions

[§_767.61](#)

2) Property division

Comment

- a. Consider whether property fairly evaluated and if not divided evenly, whether reasons for uneven division justified under [§_767.61](#)

[§_767.34](#)

- b. Ct may not approve stipulation that assigns substantially all property to one party if other party is applying for Medical Assistance, or
- c. Ct determines that it can be reasonably anticipated that other party will apply for Medical Assistance within 30 months after the stipulation

§_767.56

3) Maintenance

- a. If waived, consider whether waiver is voluntary, fair, and just in light of statutory factors
- b. If ordered, consider whether amount is sufficient to support receiving party at appropriate standard of living

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

4) Parties may stipulate as to matters Ct lacks authority to order

Nichols v Nichols

[162 Wis. 2d 96](#) (1991)

Rintelman v Rintelman

[118 Wis. 2d 587](#) (1984)

- a. Parties are estopped from subsequently questioning validity of that provision of judgment if Ct, at time of divorce finds
 - Both parties stipulate, and
 - Parties are doing so freely and voluntarily, and
 - Overall settlement is fair and equitable, and
 - Provision is not against public policy, and
- b. Ct must advise parties Ct could not order provision on its own

Jacobson v Jacobson

[177 Wis. 2d 539](#)

(Ct. App. 1993)

- c. In cases in which parties agree to matters contrary to statute, e.g., that maintenance does not terminate upon remarriage, judgment must be explicit

K. Approval or modification of stipulation by Ct

Comment

- 1) If Ct modifies stipulation, Ct should give parties an opportunity to accept modification or repudiate stipulation and try case as contested proceeding

Hottenroth v Hetsko

[2006 WI App 249](#)

[298 Wis. 2d 200](#)

Norman v Norman

[117 Wis. 2d 80](#)

(Ct. App. 1983)

- 2) Either party may repudiate stipulation before or during trial, but must repudiate before Ct accepts stipulation

§_757.69(1)(p)

L. CCC may preside at hearing and grant and enter judgment if

§_757.69(1)(p)

- 1) Assigned to assist in matters affecting the family, and
- 2) Both parties state marriage is irretrievably broken and that all material issues are resolved, or one party does not participate in divorce action, and
- 3) CCC does not modify agreement between parties on material issues

If CCC does not approve stipulation, must certify to Ct for trial

5. Judgment**A. Make sufficient findings and conclusions to support judgment of divorce and to support decisions on financial matters and child legal custody and periods of physical placement**

§_767.395

B. Grant any request by party to resume a former legal surname, except as provided in §_301.47

§_767.35(3)

§_765.03(2)

C. Inform parties that although divorce is effective immediately, any marriage contracted within 6 months by either party is void

§_767.251(2)

D. Direct moving party to draft findings of fact, conclusions of law, and written judgment to be submitted to Ct within 30 days

Comment

Remedies for failure to timely file may vary from Cty to Cty

E. If support or maintenance awarded

§_767.75

- 1) Automatic wage assignment unless

Ct finds income withholding likely to cause payer irreparable harm

§_767.251(1)

- 2) Judgment must warn that failure to pay ordered support or maintenance is contempt, punishable by imprisonment

§_767.58(1)

- 3) Judgment must include order that both parties notify CSA of any change of address within 10 days after change. Order must also require payer to notify CSA and payee of any change of employer and any substantial change of income within 10 days after change. Order must also require payee to notify Ct and payer within 10 days after payee's remarriage

[§_767.54](#)

- 4) Ct shall order what information must be exchanged and when (no later than May 1 of each year) to determine any need for adjustment. Information must include all of the following:
 - a. Complete copy of each party's federal and state income tax returns for prior calendar year, including all W-2 forms and 1099 forms
 - b. A year-end paycheck stub from all sources of employment for the prior calendar year
 - c. Each party's most recent paycheck stub from all sources of employment, showing year-to-date gross and net income
 - d. Any other documentation of each party's income from all sources for the 12-month period preceding the exchange of information

F. If child legal custody or physical placement decided, judgment must

[§_948.31](#)

[§_767.41\(8\)](#)

- 1) Warn that intentionally concealing child from other parent or withholding child for more than 12 hours after period of physical placement, without consent, is a felony
- 2) Contain provisions concerning relocation of the child's residence

[§_767.41\(6\)\(h\)1., 2., 3.,](#)

as created by

2017 Wis Act 203

(eff 4/5/2018)

- a. In actions commenced on **or after April 5, 2018** (including actions to modify judgments or orders previously granted), inform parents (and any other person granted legal custody of child), in writing, that
 - Each parent must notify other parent, CSA, and Clerk of Ct of address at which parent may be served within 10 business days after moving to that address
 - Address provided to Ct is address on which other parties may rely for service of any motion relating to modification of legal custody, physical placement, or relocation
 - Parent granted physical placement must obtain Ct order before relocating 100 miles or more from other parent if other parent also has Ct-ordered periods of physical placement

[RMC Form FA-608](#)

[§_767.41\(7m\)](#)

G. Ct to require medical history and report of any medical examination parent had within a year of order to be provided

- 1) Information is confidential
- 2) Must be provided by noncustodial parent or, if joint custody, by both parents

FA 2: CONTESTED DIVORCE

1. Jurisdiction

A. See Jurisdiction in Stipulated Divorce, [FA 1](#)

2. Initiation of Action

A. Parties

§_767.205(1)

- 1) Either or both parties to marriage can initiate action

Obergefell v Hodges

[135 S. Ct. 2584](#) (2015)

- 2) The 14th Amendment requires that the various states recognize same-sex marriages that have been licensed and validly performed in another state

§_767.205(2)

- 3) State is real party in interest

a. When AFDC, W-2, or Medical Assistance is provided to a dependent, or

b. If completed application for legal services filed with Child Support Agency (CSA)

B. Summons

§_767.215(2m)

- 1) If action initiated by one party and parties have minor children, summons served on other party must

- a. Include notification of availability of information under §_767.105(2) and of the contents of parental interference with custody law, §_948.31, and

§_767.105

- Office of FCC should provide upon request information on procedures, major issues in family matters, community resources and counseling, statutory provisions

- b. Be accompanied by a document setting forth child support standards established by DCF (see [Wis. Admin. Code](#) Ch DCF 150) and listing [§_767.511\(1m\)](#) child support standards
- c. Be accompanied by copy of [§_767.41\(1m\)](#) or by Cty’s standard parenting plan form
- d. [Sec.](#) 948.31 information can be referred to by statute number if service is by publication

[§_767.215\(3\)](#)

- 2) Service not required if joint petition

[§_767.215](#)

C. Contents of petition

[§_767.205\(3\)](#)

- 1) All pleadings to be entitled “In re the marriage of A.B. and C.D.”

[§_767.215](#)

- 2) Parties’ names, birthdates, and facts of residence

[§_767.215\(5\)](#)

Petitioning party should file separate form with parties’ and children’s Social Security numbers

- 3) Date and place of marriage
- 4) Facts about prior or pending actions for divorce or legal separation
- 5) Names and birthdates of minor children of parties
 - a. Other children born to wife during marriage
 - b. Whether wife is pregnant
 - c. UCCJEA jurisdictional information required by [§_822.29](#) (See [FA 15](#) for details)
- 6) Previous marriages—how, when, and where terminated
- 7) That marriage is irretrievably broken, or parties so agree
- 8) Whether agreements as to support, legal custody and periods of physical placement of children, maintenance, and property division, have been reached

If so, attach copies

9) Relief requested

10) Signature of petitioner or Atty

If joint petition, both parties or their respective Attys must sign

[§_767.215\(2\)\(h\), \(i\), \(j\)](#)

[§_767.117](#)

11) Parties are automatically restrained from removing or relocating with children; disposing of assets; or harassing, intimidating, physically abusing, or imposing any restraint on personal liberty of other party or minor child of other party

[§_767.117](#)

D. Prohibitions upon commencement of action

1) Prohibited acts are

- a. Harassing, intimidating, physically abusing, or imposing any restraint on personal liberty of other party or minor child of either party
- b. If action is under [§_767.001\(1\)\(a\), \(b\), \(c\), \(d\), \(h\), or \(i\)](#), encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of property owned by either or both parties without consent of other party or order of Ct, except

- In usual course of business
- In order to secure necessities, or
- In order to pay reasonable costs and expenses of the action, including Atty fees

[§_767.117\(1\)\(c\)](#)

c. Unless action is under [§_767.001\(1\)\(g\) or \(h\)](#), without consent of other party or an order of Ct or CCC

- Establishing a residence with minor child of parties more than 100 miles from residence of other party
- Removing minor child of parties from Wis for more than 90 consecutive days, or
- Concealing minor child of parties from other party

2) Prohibitions apply until action dismissed, final judgment entered, or Ct or CCC orders otherwise

3) Except as provided below, party who violates any provision may be proceeding against under [Ch 785](#) for contempt

Act in violation is not a contempt if Ct finds action taken to protect party or minor child of parties from physical abuse by other party and no reasonable opportunity under the circumstances for party to obtain order authorizing action

§_767.215(3)

E. Response

1) Served on petitioner within 20 days after date summons was served

a. Original copy filed in Ct

b. Jurisdictional objections may be raised any time before judgment

§_767.215(3)

Artis-Wergin v

Artis-Wergin

[151 Wis. 2d 445](#)

(Ct. App. 1989)

- BUT, when party seeks affirmative relief from the Ct without reserving jurisdictional objection, party cannot later argue that Ct is without personal jurisdiction

Comment

2) Response pleadings are not necessary to proceed as contested matter in family cases

F. Service on Office of FCC

2005 Wis Act 443,

§_69—Note

May be required by local rule

G. Service on CSA

§_767.217

1) If either party is recipient of AFDC, W-2, or Medical Assistance and order regarding child support or maintenance is sought, each party must

Serve copy of pleading or applicable motion on CSA in Cty under §_59.53(5) within 20 days after service on opposing party or before filing in Ct

§_767.217(3)

2) No judgment for support or maintenance to be granted unless notice is given, except as otherwise ordered by Ct

§_767.217(2)

3) If action is appealed, appellant must send notice of appeal to DCF

3. Pretrial Matters

§_767.335

A. Statutory waiting period

1) Trial may not be held before

- a. Expiration of 120 days after service of summons and petition on respondent, or
- b. 120 days after filing of joint petition

§_767.335(2)

- c. Unless Ct orders waiver of 120-day period

§_767.335(2)

§_767.405(8)(b)

2) Ct may order immediate hearing for protection of either party or child(ren) of marriage

- a. Considering recommendation of CCC
- b. Limited to need for
 - Protecting health or safety of either party
 - Protecting health or safety of minor children
 - Other emergency reasons

- c. Ct must state grounds for order

3) If legal custody or physical placement of child contested, parties must attend at least one mediation session (See Mediation/Arbitration section in **Custody/Placement**, [FA 13](#), Sec. 4)

§_767.405(8)(b)

4) Ct may waive mediation requirement if Ct finds mediation would endanger health or safety of one of the parties

Evidence could consist of child abuse, interspousal battery, alcohol or drug abuse problems, threats to health or safety, or any related problems

B. Disclosure of assets

§_767.127(1)

1) Ct shall require full disclosure of all assets and liabilities of parties

- a. Mandatory unless one party's whereabouts unknown

Comment

- Impossible for Ct to make proper findings without this underlying data notwithstanding wording of [§_767.127\(4\)](#)

b. May require use of standard forms

c. See **Property Division**, [FA 8](#)

[§_767.127\(1m\)](#)

2) If minor child involved, Ct shall require that each party disclose

a. Types and costs of health insurance policies or plans offered by employer or other organization

b. Copy of any health-care policy or plan naming minor child as beneficiary at time of filing disclosure

[§_767.127\(2\)](#)

3) Disclosure forms filed within 90 days after service of summons or filing of joint petition, or as ordered by CCC or Ct

Information must be updated on record at trial

[§_767.127\(1\)](#)

4) State/federal income tax returns for last 2 years

a. On own initiative, Ct may require copies

b. On request of party, Ct shall require copies

c. Ct may also require copies of tax returns from previous years

[§_767.127\(4\)](#)

5) Failure to timely file disclosure allows Ct to accept other party's information as accurate

[§_767.127\(3\)](#)

6) Information is confidential

a. May not be made available to any person for any purpose other than adjudication, appeal, modification, or enforcement of judgment affecting family of disclosing parties, except

b. Clerk of Ct shall provide information from Ct records to DCF for administration of child support program

C. GAL

[§_767.407](#)

[§_767.405\(12\)\(b\)](#)

1) Appointment required if

- a. Legal custody or physical placement of minor child contested, and agreement not reached under mediation, or
- b. Paternity of minor child contested, or
- c. Ct has reason for special concern for future welfare of child

2) See **Custody/Placement**, [FA 13](#), for details

D. Referee

See [FA 3 \(ADR\), Sec. 5](#)

4. Temporary Orders

[§_767.225\(1\)](#)

A. While action is pending, Ct or CCC may make just and reasonable orders about

1) Child custody and placement

- a. May order temporary joint legal custody without agreement of other party and without findings required under [§_767.41\(2\)\(b\)2](#).
- b. Order has no binding effect on final custody determination

2) Prohibiting relocation of children from Ct jurisdiction

3) Child support and maintenance

4) Assignment of income, payment of debts, and other matters relating to parties' property, including Atty fees to bring or respond to the action

5) Maintaining minor children as beneficiaries on health insurance policy or plan

[§_767.215\(1\)](#)

[§_767.117](#)

6) Prohibiting disposal of assets. ([Secs. 767.215\(2\)](#) and [767.117](#) automatically restrain parties)

7) Requiring counseling

- 8) Prohibiting either spouse from restraining personal liberty of other

Sandy v Sandy

[109 Wis. 2d 564](#) (1982)

Can evict party from homestead

- 9) Periods of electronic communication in manner consistent with [§_767.41](#)

B. Order made on motion served at time action commenced or any time after commencement

[§_767.225\(2\)](#)

Motion accompanied by affidavit stating basis for request

[§_767.225\(1n\)\(c\)](#)

C. Order may be based on stipulation of parties

[§_767.225\(1n\)\(a\), \(b\)1.](#)

D. Ct or CCC must consider factors governing final judgments in subject covered by order (e.g., if deviating from percentage standards, must state reasons)

[§_767.225\(3m\)](#)

E. If CCC believes domestic abuse TRO or injunction may be appropriate, shall inform parties of procedures

If motion filed, CCC must submit it to Ct within 5 working days

[§_767.225\(1n\)](#)

[§_767.17](#)

F. CCC's temporary orders reviewable by Ct upon motion of any party

- 1) Party may request new hearing
- 2) Party must be present at the hearing to seek a de novo review
- 3) Right to de novo review does not apply to stipulations entered into between the parties
- 4) Notices requesting de novo review will not stay the order unless the Trial Ct grants a stay
- 5) If a party seeks a de novo review, the party shall file a motion for hearing de novo within 20 calendar days after an oral decision or 20 calendar days after mailing a written decision by the CCC
- 6) Ct shall hold a hearing de novo no later than 60 days from the filing of the motion for de novo review

Jahimiak v Jahimiak

[2024 WI App 5](#)

[410 Wis. 2d 557](#)

But this timeline is directory, not mandatory

5. Suspension to Effect Reconciliation

§_767.323

A. During pendency of action, Ct may suspend all orders and proceedings for discretionary period, up to 90 days

Upon written stipulation of both parties that they desire to attempt reconciliation

B. Effect of reconciliation suspension

- 1) Parties may live together as husband and wife
- 2) Not an admission that marriage not irretrievably broken
- 3) Not a waiver of ground that parties have lived apart continuously for 12 months preceding action

C. Suspension revoked by Ct order on motion of either party

D. If parties reconcile, action dismissed

E. If parties fail to reconcile, action proceeds as if there had been no reconciliation attempt

6. Trial

A. Appearance of parties

§_767.235(2)

- 1) Both parties required to appear unless
 - a. Nonresidence in State, shown by competent evidence, or
 - b. Service is by publication, or
 - c. Ct excuses appearance based on good cause
- 2) Order for appearance shall be procured by moving party
 - a. Either Judge or CCC can issue order

- b. Must be served on nonmoving party before trial
- c. Order not required with joint petition

Poncek v Poncek

[121 Wis. 2d 191](#)

(Ct. App. 1984)

- 3) Failure to serve order for appearance is harmless error when recipient had actual knowledge of hearing and deliberately chose not to appear

50 [USC](#) §§ 3901–4043

B. Servicemembers Civil Relief Act

50 [USC](#) § 3931(b)(1)

- 1) When a party fails to appear, other party must file affidavit stating whether absent party is in military service

50 [USC](#) § 3931(b)(2)

- 2) If absent party in active military service, Ct may not enter judgment unless Atty is appointed to represent and protect interest of party in military

Atty may not waive rights of party in military or bind party by Atty's act

- 3) Stay of proceeding

50 [USC](#) § 3932

- a. Ct may, in its discretion, stay action
- b. Ct shall stay action on application of party in military, if application includes

- Letter setting forth facts stating manner in which current military duty requirements materially affect servicemember's ability to appear and stating date when servicemember will be available to appear
- Letter from servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for servicemember at time of letter

50 [USC](#) § 3935

- c. Stay for period of military service plus 90 days
- 4) Ct may make other orders or enter judgments Ct deems necessary to protect party's interests under Servicemembers Civil Relief Act

C. Appearance of CCC

2005 Wis Act 443,

§ 69—Note

- 1) Shall appear if required by local rule

- 2) Shall appear when requested by Judge

D. Trial procedure

§_767.235(1)

- 1) Trial is before the Ct

§_767.235(3)

- 2) Ct may exclude all persons except parties, Attys, and GAL. (Use sparingly, because exclusion conflicts with free access to Cts)

- a. On own motion, or on motion of any party

St ex rel

Wis State Jnl v Cir Ct

[131 Wis. 2d 515](#)

(Ct. App. 1986)

- b. Must first hold hearing on question of closure

- c. Must publicly reach decision on closure based on exercise of discretion

§_757.14

- d. Statutory presumption that trials will be public. Circumstances justifying closure must be unusually compelling

§_767.235(1)

[SCR](#) ch. 71

- 3) Verbatim record must be made

On Ct order, testimony shall be transcribed and filed with the record

§_801.01(2)

- 4) Rules of Civil Procedure and evidence apply unless otherwise provided in [Ch 767](#)

§_767.235(1)

- 5) Custody proceedings receive scheduling priority

E. Prerequisite matters to be proved at trial

§_767.01(1), §_767.301

- 1) Jurisdictional and residential requirements met

§_767.235(2)

- 2) Parties received proper notice, orders for appearance issued

§_767.405

- 3) Mediation requirement met if legal custody or physical placement of minor child contested

- a. Ct notified that mediation completed or terminated, or

b. Ct notified that mediation inappropriate

§_767.405(8)(b)

c. Ct may waive required mediation session upon finding that such session will cause undue hardship or would endanger health or safety of one of parties

- Ct shall consider evidence of child abuse, interspousal battery or domestic abuse, significant problem with alcohol or drug abuse, and other evidence showing danger to party's health or safety by attending session

d. HOWEVER, Ct may hold trial on issues in divorce other than those involving legal custody and physical placement while mediation occurring

§_767.127(1), (1m), (2)

4) Financial disclosure statements and health-care information filed and updated

F. Evidence presented at trial

§_767.215

1) Prove up information in petition

§_767.315(1)

2) Acknowledge that marriage is irretrievably broken or other grounds

§_767.127

3) Reliable testimony on current assets, their values, and liabilities

§_767.127(1m)

4) On existence of health-care policies and plans, if minor child(ren)

5) Requests for child custody and placement, maintenance, and support and amount party seeking

Bisone v Bisone[165 Wis. 2d 114](#)

(Ct. App. 1991)

6) Ct can use computer printout in calculating support, maintenance

7. Stipulations in Contested Trials

§_767.333

A. Parties may agree to partial, pre-judgment stipulations, subject to approval of Judge under §_767.333

1) Stipulations may address any of the following issues:

a. Legal custody or physical placement

Stipulation regarding legal custody or physical placement is enforceable as an initial order when entered

b. Child support

c. Maintenance

d. Property division

- 2) Before entering stipulation under [§ 767.333](#), Judge must hold hearing on the record with both parties and the child support agency, if a party, to determine parties' understanding and intent

[§ 767.34](#)

B. Parties may, subject to approval of Ct under [§ 767.34](#), stipulate to

1) Division of marital estate, value of assets

- a. Ct may not approve stipulation that assigns substantially all property to one party if other party applying for medical assistance, or
- b. Ct determines it can be reasonably anticipated that other party will apply for medical assistance within 30 months after stipulation

2) Maintenance payments

[§ 767.511\(1\)\(a\), \(1j\)](#)

3) Support of children—expressed as fixed sum

- a. Parties may also stipulate to expressing amount as percentage if [§ 767.34\(2\)\(am\)](#) factors are met

[§ 767.511\(1n\)](#)

- b. If deviating from percentage standard, need findings

4) Child custody and periods of physical placement

Comment

Ct should make record establishing child's best interest

Van Boxtel v Van Boxtel

[2001 WI 40](#)

[242 Wis. 2d 474](#)

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

C. However, agreements or stipulations entered into after commencement of proceedings not binding on Ct

1) When Ct adopts stipulation, Ct makes it part of judgment and does so on own responsibility

Miner v Miner

[10 Wis. 2d 438](#) (1960)

- 2) Must examine parties and determine whether they
 - a. Understand the stipulation, and
 - b. Voluntarily entered into it
- 3) Ct may reject stipulation and require proof or modify stipulation

Jacobson v Jacobson

[177 Wis. 2d 539](#)

(Ct. App. 1993)

- 4) In cases in which parties agree to matters contrary to statute, e.g., that maintenance does not terminate upon remarriage, judgment must be explicit

8. Findings, Judgment, and Warnings

[§_767.01\(1\)](#)

[§_767.301](#)

A. Determine that jurisdictional and residence requirements have been met

[§_767.315\(1\)\(a\)](#)

B. Determine whether marriage irretrievably broken

- 1) Mandatory finding
 - a. If both parties state, by petition or otherwise under oath, that marriage irretrievably broken, or
 - b. Parties have voluntarily lived apart continuously for 12 months immediately preceding commencement of action, and one party so swears or affirms

[§_767.315\(1\)\(b\)](#)

- 2) Ct finding
 - a. If parties have not voluntarily lived apart for 12 months immediately preceding commencement of action, and only one party swears or affirms marriage irretrievably broken
 - Ct must consider all relevant factors, including
 - Circumstances giving rise to filing of petition and
 - Prospect of reconciliation

- 3) If Ct finds no reasonable prospect of reconciliation, Ct to make finding that marriage irretrievably broken

Comment

Findings should specify facts supporting conclusion that marriage is irretrievably broken

§_767.315(1)(b)

- 4) If Ct finds reasonable prospect of reconciliation, Ct
 - a. Shall continue for further hearing 30 to 60 days later, or as soon after as may be reached on Ct calendar
 - b. May suggest counseling to parties
 - c. On own motion or on request of either party, may order counseling
- 5) If no reconciliation, at adjourned hearing, if either party swears marriage irretrievably broken, Ct shall make finding whether it is

C. Determine related matters

§_767.241, §_767.511

§_767.531, §_767.56

§_767.61

- 1) Determine financial matters

See **Property Division** ([FA 8](#)), **Maintenance** ([FA 9](#)), and **Fees/Costs** ([FA 12](#))

§_767.41

- 2) Determine legal custody and periods of physical placement

See **Custody/Placement**, [FA 13](#), for details

§_767.43

- 3) Determine visitation rights of non-parents if petition filed and notice given

§_767.395

- 4) Grant either spouse's request to resume a former legal surname, except as provided in §_301.47

Trieschmann v

Trieschmann

[178 Wis. 2d 538](#)

(Ct. App. 1993)

- 5) Make other appropriate findings and conclusions

Comment

Ct must do more than simply say the Ct is adopting findings submitted in a brief

§_767.35(3)

§_765.03(2)

D. Inform parties that although divorce is effective immediately, any marriage contracted within 6 months by either party is void

E. Warnings in judgment

§_767.251(1)

- 1) If judgment orders payment of support or maintenance, warn that failure to comply with order is contempt, punishable by imprisonment

§_767.35(6)

So far as divorce judgment affects marital status of parties, Ct has power to vacate or modify judgment for sufficient cause upon own motion or upon application of both parties to action, at any time, within 6 months from granting of judgment

- 2) If child legal custody or physical placement decided,

§_767.41(8)

§_948.31

- a. Judgment must include notice that intentionally concealing or withholding child from other parent without consent, to deprive other parent of legal custody or period of physical placement, is a felony

- b. Judgment must also contain provisions concerning relocation of the child's residence

§_767.41(6)(h)1., 2., 3.,

as created by

2017 Wis Act 203

(eff 4/5/2018)

- In actions commenced **on or after April 5, 2018** (including actions to modify judgments or orders previously granted), Ct must inform parents (and any other person granted legal custody), in writing, that
 - Each parent must notify other parent, CSA, and Clerk of Ct of address at which parent may be served within 10 business days after moving to that address
 - Address provided to Ct is address on which other parties may rely for service of any motion relating to modification of legal custody, physical placement, or relocation
 - Parent granted physical placement must obtain Ct order before relocating 100 miles or more from other parent if other parent also has Ct-ordered periods of physical placement

§_767.58

- 3) Both parties must inform CSA of any change of address and any substantial change of income within 10 business days after change
- 4) Provision that disobedience is punishable under [Ch 785](#)

F. TPR warning

§_767.41(4)(cm)

- 1) If parent is denied period of physical placement or if Ct transfers legal custody to agency or relative under [§_767.41\(3\)](#)

§_48.356

- a. Ct must warn of any grounds for termination of parental rights under [§_48.415](#) that may be applicable [§_48.356](#)
- b. Warning must be given orally and in writing

G. Medical information

[RMC Form FA-608](#)

[§_767.41\(7m\)](#)

Ct must require medical history and report of any medical examination parent had within a year after order

- 1) Information is confidential
- 2) Must be provided by noncustodial parent or, if joint custody, by both parents

9. Written Findings of Fact and Conclusions of Law

A. Form of judgment

[§_767.251](#)

- 1) Direct moving party to draft findings of fact, conclusions of law, and written judgment
 - a. Findings and judgment submitted to Ct and filed with clerk within 30 days after granting judgment
 - If other party represented by Atty, must be submitted to counsel for approval
 - If CCC appeared, must be submitted to CCC for approval
 - b. When necessary approvals obtained, submitted to Ct, with final stipulations of parties appended

Comment

- If approvals not forthcoming, Ct can either set a hearing or enter appropriate findings, conclusions of law, and judgment on own motion

10. Changes in Judgment

[§_767.35\(6\)](#)

A. Ct may vacate or modify judgment on marital status issues upon good cause shown, within 6 months after granting such judgment

- 1) On own motion, or on application of both parties

- 2) Vacation of judgment restores parties to prior marital status

[§_767.35\(7\)](#)

B. Ct shall revoke judgment and orders not affecting rights of a third party if parties afterward intermarry, and if

- 1) Parties make joint application for revocation, and

- 2) Satisfactory proof of remarriage presented

[§_767.35\(6\), \(7\)](#)

C. If judgment vacated or revoked, Ct shall order impoundment of record of action

Impounded record cannot be offered or admitted as evidence in any proceeding, except

- 1) By special order of Ct of jurisdiction for good cause shown in paternity proceedings, or
- 2) By special order of any Ct of record on showing of necessity to clear real estate title

D. Fraud on Ct in disclosure of assets

[§_767.127\(5\)](#)

- 1) If a party intentionally or negligently fails to disclose all assets as required by [§_767.127\(1\)](#) and, as a result, asset(s) with fair market value of \$500 or more are omitted from final distribution of property
 - a. Party aggrieved by nondisclosure may petition Ct that granted judgment for creation of constructive trust
 - Petition may be filed at any time
 - b. On finding of failure to disclose, Ct shall declare the creation of constructive trust of all nondisclosed assets for benefit of parties and minor or dependent children
 - Party in whose name assets are held is declared constructive trustee
 - Ct may determine other terms and conditions

[§_806.07](#)

Ennis v Ennis

[88 Wis. 2d 82](#)

(Ct. App. 1979)

E. Other motions for relief from judgment governed by Rules of Civil Procedure

[§_806.07\(1\)\(c\), \(2\)](#)

If based on fraud, other than disclosure of assets, one-year statute of limitation

F. Appeal of judgment

[§_808.04](#)

[§_808.075](#)

- 1) Initiated within 45 days after entry of judgment if written notice of entry given, or within 90 days if notice not given
- 2) Despite pendency of appeal, Circuit Ct may
 - a. Revise orders for legal custody or periods of physical placement
 - b. Issue or modify orders for visitation rights
 - c. Make annual adjustment of child support
 - d. Revise judgment for child support or maintenance payments
 - e. Order temporary maintenance, temporary child support, or allowance for suit money, counsel fees, and disbursements in Appellate Ct under [§_767.273](#)
 - f. Divide property, if Ct has expressly or impliedly reserved jurisdiction, as long as Ct does not revise or modify its final division of property
 - g. Vacate or modify judgment under [§_767.35\(6\)](#) insofar as modification affects marital status of parties
 - h. Revoke judgment under [§_767.35\(7\)](#)
 - i. Act to enforce payments, orders, or modifications of assignments
 - j. Enforce or modify account transfers under [§_767.76](#)
 - k. Determine charges and issuance of repayment orders under [§_767.71](#)
- 3) If case is remanded for clarification or modification, NO substitution of Judge permitted, despite [§_801.58\(7\)](#)
 - a. Trial Judge is familiar with parties and circumstances and therefore best prepared to hear further proceedings

*Parrish v
Kenosha Cty Cir Ct*
[148 Wis. 2d 700 \(1989\)](#)

- b. Denial of substitution facilitates efficient allocation of judicial resources

FA 3: ALTERNATIVE DISPUTE RESOLUTION (ADR) IN FAMILY CASES

§_802.12(3)

1. Types of ADR Methods Available in Family Cases

§_802.12(1)(b)

A. Direct negotiation—no 3rd party involved

§_802.12(1)(c)

B. Early neutral evaluation—neutral 3rd party gives an appraisal with suggestions

§_802.12(1)(e)

C. Mediation—neutral 3rd person helps parties reach agreement voluntarily

§_802.12(1)(g)

D. Moderated settlement conference—at settlement conference, one or more neutral 3rd parties receive brief presentations and render advisory opinion

§_802.12(1)(h)

E. Nonbinding arbitration—neutral 3rd party renders nonbinding decision, which may also be basis for subsequent negotiation between parties

§_802.12(1)(a)

F. Binding arbitration—neutral 3rd person given authority to render legally binding decision

§_805.06

St ex rel Universal

Processing Servs of Wis,

LLC v Circuit Ct

[2017 WI 26](#)

[374 Wis. 2d 26](#)

G. Referee—neutral 3rd person appointed by an order of the Ct. The order must specifically delineate the authority of the referee, but shall not impermissibly delegate to the referee judicial power that is constitutionally vested in the Ct

§_802.12(2)

2. ADR Referrals by the Judge

A. Judge may, with or without motion, upon determining that action is appropriate for ADR, order parties to select settlement alternative

B. Procedure to follow

- 1) Order may require that parties participate personally

- 2) Any party aggrieved by such order shall be allowed to show cause why it should be vacated or modified
 - 3) Parties must inform Judge of method selected and person to provide settlement alternative
 - 4) If parties cannot agree on settlement alternative, Judge shall specify least costly method likely to bring parties together except, unless parties consent, binding arbitration, nonbinding arbitration, or more than one of the settlement alternatives listed in [§_802.12\(2\)\(b\)](#)
 - 5) If parties cannot agree on person, Judge may appoint any person Judge believes has ability to bring parties together in settlement
 - 6) If parties cannot agree on payment of the cost, Judge shall direct parties to pay reasonable fees and expenses
- [§_802.12\(3\)](#)
- 7) Any GAL appointed shall be party to any settlement alternative regarding custody, physical placement, visitation, support, or other interests of the ward

[§_767.405\(5\)](#)

3. Mediation Referrals

A. Must be ordered in any action affecting the family, including revision of judgment in which legal custody or physical placement is contested

[§_767.405\(5\)\(a\)1.](#)

B. Ct must inform parties that confidentiality of communications in mediation is waived if parties stipulate under [§_767.405\(14\)\(c\)](#) that person who mediates may also do the custody or placement study

[§_767.405\(5\)\(a\)2.](#)

C. Ct must inform parties that Ct may waive requirement to attend at least one mediation session if Ct finds that attending session will cause undue hardship or would endanger health or safety of one of the parties, and Ct must inform about bases on which Ct may make its determination. *See also* [Sec. G](#), *infra*

D. If parties wish to have joint custody, Ct must refer for mediation if either party requests assistance

E. Person who has placement, custody, or visitation rights, or child of person who has placement may notify CCC of a problem

CCC may refer parties for mediation

[§_767.405\(7\)](#)

F. Parties may use private mediator at own expense

[§_767.405\(8\)](#)

G. Parties must attend at least one session and file a proposed parenting plan at least 10 days before the initial session. If mediation determined appropriate, no Ct may hold a trial on custody or placement unless

- 1) Ct finds attending session will cause undue hardship or would endanger health or safety of one of the parties
- 2) In so doing Ct may consider
 - a. Child abuse by a party
 - b. Interspousal battery or domestic abuse
 - c. Any party's significant AODA problem
 - d. Evidence indicating party's health or safety will be endangered by attending the session

[§_767.405\(9\)](#)

H. When Ct requires mediation, property division, maintenance, and support may not be considered unless

- 1) Such issues are directly related to custody or placement and
- 2) Parties agree in writing to consider those issues

[§_767.405\(12\)](#)

I. Mediation agreement requirements

- 1) Must be written
- 2) Reviewed by Attys and GAL, if any
- 3) Attys must certify review on agreement
- 4) GAL, if any, must certify review and comment on best interest of child
- 5) Mediator must certify agreement is accurate

J. Lawyer-mediators' ability to draft

[SCR 20:2.4\(c\)](#)

- 1) Lawyer-mediators may neutrally draft, select, complete, modify, and file documents, confirming, memorializing, or implementing agreements reached in mediation with informed written consent of the parties
- 2) The lawyer-mediator may file the documents with the Ct, but may not appear in Ct on behalf of either or both parties

- 3) The lawyer-mediator must disclose the lawyer-mediator's participation on the document(s)

K. Non-lawyer mediator ability to draft

[SCR](#) 23.02(2)(i)

The selection or completion of an officially created legal document is not the practice of law when the document contains blanks and requires only common or transaction-specific knowledge regarding the required information and general knowledge of legal consequences

L. Ct may approve or reject agreement, but if it rejects shall give reasons in writing

M. If no agreement, parties or mediator shall notify Ct, which shall appoint GAL and consider referral for custody or placement study

N. Parties may return to mediation at any time before any trial or final hearing

[§](#) 802.12(3)

4. Binding Arbitration

[§](#) 802.12(1)(a)

A. Requirements to proceed

- 1) All parties must consent
- 2) Parties must agree as to neutral 3rd person
- 3) If parties cannot agree, Judge selects person
- 4) Parties must agree as to application of rules of evidence or agree that arbitrator determines applicability of rules

[§](#) 802.12(3)(d)

B. Although following issues may be arbitrated, special requirements apply

- 1) Custody and physical placement under [§§](#) 767.41, 767.804(3), 767.805(4), 767.863(3), or 767.89(3)
- 2) Visitation rights under [§](#) 767.43 (grandparents, stepparents, and persons having a child–parent relationship)
- 3) Child support under [§§](#) 767.511, 767.804(3), 767.805(4), 767.863(3), or 767.89 (paternity)
- 4) Modification of any of above under [§§](#) 767.451 or 767.59

[§](#) 802.12(3)(e)

C. No confirmation of an award involving any of above issues unless all of following apply

- 1) Arbitrator's award sets forth detailed findings of fact
- 2) Arbitrator certifies that all applicable statutory requirements have been satisfied
- 3) Ct finds that custody and physical placement have been determined in the manner required under §§ 767.405, 767.407, and 767.41
- 4) Ct finds that visitation rights have been determined in manner required under §§ 767.405, 767.407, and 767.43
- 5) Ct finds that child support has been determined in the manner required under §§ 767.511 or 767.89

§ 802.12(3)(c)

D. Above special requirements do not apply to

- 1) Property division under § 767.61
- 2) Maintenance under § 767.56
- 3) Atty fees under § 767.241
- 4) Postjudgment orders modifying maintenance under § 767.59

E. Confirmation of arbitration decision

§ 802.12(1)(a)5., (3)(c), (e)

- 1) All arbitration awards subject to judicial review and must be confirmed before they can be enforced
- 2) Secs. 788.10 and 788.11 govern review

§ 788.10

- 3) An award may be vacated if
 - a. Procured by corruption, fraud, or undue means
 - b. There was evident partiality on arbitrator's part
 - c. Arbitrator guilty of misconduct in refusing to
 - Postpone upon sufficient cause or

- Hear pertinent and material evidence or of prejudicial misbehavior

d. Arbitrator exceeded powers or so imperfectly executed them that a mutual, final, and definite award was not made

§_788.11

4) An award may be modified if

a. There was an evident material miscalculation of figures or an evident material mistake in the description of a person or property

b. Arbitrator awarded on a matter not submitted

c. Award is imperfect in matter of form not affecting the merits of the controversy

§_788.09

5) Confirmation application must be made within one year after the award

§_788.12

6) Judgment may be entered upon the granting of an order of confirmation, modification, or correction

5. Referee

§_805.06(1)

A. A referee shall have such qualifications as the Ct deems appropriate

§_805.06(2)

St ex rel Universal

Processing Servs of Wis,

LLC v Circuit Ct

[2017 WI 26](#)

[374 Wis. 2d 26](#)

B. Appointment of a referee shall be the exception not the rule and shall be made only upon a showing that some exceptional condition requires it

§_805.06(3)

C. The order appointing a referee must specifically delineate the authority of the referee, but must not impermissibly delegate to the referee judicial power that is constitutionally vested in the Ct

§_805.06(5)

D. The referee shall prepare a report and, if required to make findings of fact and conclusions of law, the referee shall set them forth in the report

§_805.06(5)(b)

St ex rel Universal

Processing Servs of Wis,

LLC v Circuit Ct

[2017 WI 26](#)

[374 Wis. 2d 26](#)

E. In a family action, the Ct shall accept the referee's findings of fact unless clearly erroneous

§_805.06(5)(d)

F. The effect of the referee's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a referee's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered**6. Admissibility**

§_802.12(4)

A. Except for binding arbitration, all settlement alternatives are compromise negotiations for purposes of §_904.08 (compromise and offers of compromise generally not admissible) and mediation for purposes of §_904.085 (communications in mediation generally not admissible)**FA 4: USE OF CONTEMPT****1. Contempt Generally**[Ch 785](#)**A. Types of contempt generally**

- 1) Summary Punitive: In actual presence of Ct to protect authority and dignity of Ct
- 2) Nonsummary Punitive: By criminal proceeding initiated by prosecutor at request of party or Judge
- 3) Nonsummary Remedial: Initiated by motion to enforce order of Ct filed in the proceeding in which the contempt is related

B. Contempt to enforce Ct order or judgment in divorce proceeding is remedial in nature

- 1) Discussion here limited to nonsummary remedial contempt
- 2) For discussion of other types of contempt see [Civil Benchbook](#)

2. Authority, Purpose, and Extent

St v AWO
(Paternity of DAAP)
[117 Wis. 2d 120](#)
 (Ct. App. 1983)

A. Family Ct has inherent power to enforce its orders through contempt of Ct proceedings

Socha v Socha
[183 Wis. 2d 390](#)
 (Ct. App. 1983)

However, Ct loses all jurisdiction following the death of either party to a divorce action

§_767.75(6), §_767.77
 §_767.78

B. Ct also has specific statutory authority to enforce orders through contempt

§_785.01, §_785.03
Schroeder v Schroeder
[100 Wis. 2d 625](#) (1981)

Nonsummary remedial contempt sanction is normally appropriate for enforcement of orders

Larsen v Larsen
[165 Wis. 2d 679](#) (1992)

C. Purpose of contempt is remedial or coercive and designed to enforce private right of party in Ct order

D. Extent of Use

Bliwas v Bliwas
[47 Wis.2d 635](#) (1970)
Ross v Ross
[149 Wis. 2d 713](#)
 (Ct. App. 1989)

- 1) Provisions stipulated to by parties enforceable through contempt power, even if in excess of Ct's jurisdiction to order

May v May
[2012 WI 35](#), ¶¶ 28, 35
[339 Wis. 2d 626](#)
Krieman v Goldberg
[214 Wis. 2d 163](#)
 (Ct. App. 1997)

However, absolute prohibition against any change in support contained in stipulation will likely be void as matter of public policy

Hernandez v Allen
[2005 WI App 247](#)
[288 Wis. 2d 111](#)

- 2) TPR for stepparent adoption does not relieve birth parent of obligation to pay child support arrearage for which birth parent became liable before TPR

3. Time Considerations

§_893.40
 §_893.415

A. An action to collect judgment generally must be brought within 20 years after judgment, but actions to collect child-support arrearages may be brought within 20 years after the youngest child reaches age of 18 or, if child is enrolled full-time in high school or its equivalent, 20 years after that child reaches age of 19

State v Hamilton
[2003 WI 50](#)
[261 Wis. 2d 458](#)

- 1) [Sec. 893.415](#) was specifically enacted by 2003 Wis. Act 287 to address the Ct's decision in *Hamilton*

Griffin v Reeve

[141 Wis. 2d 699](#) (1987)

- 2) Remedial contempt for continuing disobedience of child support order available even after child obtains age of majority

4. Initiation of Contempt Proceedings

[§_767.78](#)

A. Manner of commencement

- 1) On Ct's own initiative
- 2) On application of party entitled to payments
- 3) For child support, family support, or maintenance, additional parties entitled to commence action include

[§_767.57\(1h\)](#)

a. CCC

[§_767.57\(1h\)](#)

[§_767.511\(6\)](#)

[§_767.205\(2\)](#)

b. Child Support Agency through its Atty

- Can represent non-AFDC recipient in contempt actions

- 4) By issuing order requiring payer to show cause why payer should not be held in contempt of Ct

[§_767.78](#)

B. Applicable when financial obligation incurred under

- 1) Orders during pendency of action under [§_767.225](#)
- 2) Child support under [§_767.511](#)
- 3) Property division under [§_767.61](#)
- 4) Maintenance under [§_767.56](#)
- 5) Family support under [§_767.531](#)

6) Atty fees and other fees and costs under [§_767.241](#)

7) Any other statute specified by [§_767.78\(1\)](#)

[§_767.78](#)

C. In issuing order to show cause, Ct must determine that income assignment proceeding under [§_767.75](#) is inapplicable, impractical, or unfeasible

[§_785.03](#)

D. Payer must be notified of proceeding

Dennis v Dennis

[117 Wis. 2d 249](#) (1984)

Notice is sufficient if given orally by Judge to payer on record, stating that next hearing on date set, will be hearing on contempt

[§_785.03](#)

5. Hearing Required

Murray v Murray

[128 Wis. 2d 458](#)

(Ct. App. 1986)

A. Before impartial decision-maker

[§_785.07](#)

B. Order must be issued by Judge if confinement to be imposed

C. Right to counsel at state expense limited

Ferris v St

[75 Wis. 2d 542](#) (1977)

1) No absolute right to counsel in remedial contempt actions

St v Pultz

[206 Wis. 2d 112](#) (1996)

2) If self-represented (pro se) respondent, Ct must

a. Advise that finding of contempt could result in sentence to jail

b. Advise of right to be represented by Atty

But see Turner v Rogers

[131 S. Ct. 2507](#), 2519

(2011)

c. In action initiated by State, inform indigent respondent of right to Atty at public expense

- Note: SPD is empowered to represent individuals facing incarceration.

d. Ask whether respondent believes self to be indigent

Turner v Rogers
[131 S. Ct. 2507](#), 2519
 (2011)

e. Provide adequate “procedural safeguards” as “substitute” for counsel. For example:

- Inform respondent that ability to pay or comply is critical issue at hearing
- Give respondent opportunity at hearing to respond regarding ability to pay or otherwise comply with order
- Give respondent opportunity to complete financial disclosure statements
- Make express finding regarding respondent’s ability to pay or otherwise comply with Ct order

Committee Comment

Note: *Turner v Rogers*, [131 S. Ct. 2507](#) (2011), addressed the right to counsel in civil contempt proceedings. The decision’s ultimate impact on procedures in Wis Cts is unclear.

3) Ct should adjourn hearing to allow respondent to obtain counsel or to have one appointed

D. Moving party’s burden of proof to show

Balaam v Balaam
[52 Wis. 2d 20](#) (1971)

- 1) Failure to pay Ct-ordered obligations
- 2) Obligor is able to pay or should be able to pay if can work, but will not
- 3) Failure to pay is willful

Anderson v Anderson
[82 Wis. 2d 115](#) (1978)

- 4) One may be held in contempt for violation of an order clearly erroneous (specifically ordering percentage payment on income excluded as “gross income” under [Wis. Admin. Code](#) Ch DCF 150)

Committee Comment

Apparently a technical contempt but might affect the appropriate sanction

Balaam v Balaam
[52 Wis. 2d 20](#) (1971)

E. Alleged contemnor’s burden of proof

- 1) Failure to pay is not contemptuous, or
- 2) Legal justification for failure to pay

6. Sanctions and Alternative Purge Conditions

A. Types of sanctions and alternative purge conditions authorized

[§_785.04\(1\)](#)

- 1) Ct may impose one or more of the following

Frisch v Henrichs

[2007 WI 102](#)

[304 Wis. 2d 1](#)

- a. Payment of sum of money sufficient to compensate party for loss or injury suffered as result of contempt
- b. Imprisonment for so long as person is committing contempt or 6 months, whichever is shorter
 - Not available for misconduct in presence of Ct
- c. Forfeiture of up to \$2,000 per day for each day contempt continues
- d. Order designed to ensure compliance with prior Ct order

[§_785.04\(1\)](#)

- e. Other extraordinary sanctions if
 - Ct expressly finds that above sanctions in [§_785.04\(1\)\(a\)–\(d\)](#) would be ineffective to terminate continuing contempt

B. General requirements for purge and alternative purge conditions

St ex rel VJH v CAB

[163 Wis. 2d 833](#)

(Ct. App. 1991)

- 1) Must give contemnor “keys to jailhouse door” (but see discussion of alternative purge conditions in [para. 3](#)) below)

Diane KJ v James LJ

(Paternity of Cy CJ)

[196 Wis. 2d 964](#)

(Ct. App. 1995)

Purge provision in remedial contempt is necessary to comply with due process

- 2) Must be feasible, within contemnor’s ability, and reasonably related to cause or nature of contempt

Larsen v Larsen

[165 Wis. 2d 679](#) (1992)

- a. Inpatient treatment program to eliminate cause of contempt is an appropriate purge condition not in violation of due process

CS v Racine Cty

(Int of JS)

[137 Wis. 2d 217](#)

(Ct. App.1987)

- Treatment order should not conflict with more specific commitment-for-treatment procedures under [Ch 51](#)

Frisch v Henrichs

[2007 WI 102](#), ¶ 64

[304 Wis. 2d 1](#)

- 3) ALTERNATIVE PURGE CONDITIONS may be used when compliance with Ct order is no longer possible to serve as purge condition; any alternative purge condition must comply with following requirements:
 - a. Condition should serve remedial aims
 - b. Contemnor should be able to fulfill the proposed purge condition
 - c. Condition should be reasonably related to the cause or nature of the contempt

7. Findings and Order

O'Connor v O'Connor

[48 Wis. 2d 535](#) (1970)

A. Essential findings

- 1) Def is able to pay or otherwise comply with order or should be able to pay if Def can work but will not
- 2) Refusal to pay is willful and with intent to avoid payment

Schroeder v Schroeder

[100 Wis. 2d 625](#) (1981)

- 3) Clearly spell out what payer needs to do to purge

B. Authorized findings

§ 767.127(4)

Failure to timely provide required annual financial disclosure statement under § 767.54 authorizes Ct to accept as accurate any information provided in statement of other party or obtained under § 49.22(2m) by DCF or CSA

8. Violation of Purge Conditions

St ex rel VJH v CAB

[163 Wis. 2d 833](#)

(Ct. App. 1991)

A. Requires same contempt procedures regarding hearing and findings before enforcement of underlying contempt order

Meyer v Teasdale

[2009 WI App 152](#)

[321 Wis. 2d 647](#)

- 1) Cannot execute commitment order without motion signed by Atty
- 2) Contemnor is entitled to hearing before being committed to jail for alleged failure to comply with purge conditions

B. Contemnor has burden to show purge condition unreasonable or noncompliance was unintentional or result of unforeseen events

C. Ct may modify if condition not feasible or not reasonably related to cause of underlying contempt

9. Bankruptcy as a Defense

11 [USC](#) 523(a)(5), (15)

A. Discharge does not apply to “Domestic Support Obligation” or other debts incurred during course of divorce

11 [USC](#) 101(14A)

B.

“Domestic Support Obligation”

- 1) Amount owed to spouse, former spouse, child or such child’s parent, legal guardian, or other responsible relative, or a governmental unit
- 2) Obligation is in the nature of alimony, maintenance, or support, and is established under any separation agreement, divorce decree, property settlement agreement, court order, or governmental unit determination

C. Other debts incurred during course of divorce

11 [USC](#) 523(a)(15)

Obligation is not a domestic support obligation under 11 [USC](#) 523(a)(5), but is incurred by debtor to spouse, former spouse, or child in the course of divorce or separation or in connection with separation agreement, divorce decree, or other court order, or governmental unit determination

D. Particular circumstances

In re Seibert

[914 F2d 102](#)

(7th Cir 1990)

- 1) Expenses for pregnancy and confinement in paternity action not dischargeable

Maitlen v Maitlen

(*In re Maitlen*)

[658 F2d 466](#)

(7th Cir 1981)

- 2) Payment of mortgage on former spouse’s home to provide housing for her and children is “support” and not dischargeable

In re Rios

[901 F2d 71](#)

(7th Cir 1990)

Zimmermann v Hying

(*In re Hying*)

[477 BR 731](#)

(Bankr ED WI 2012)

- 3) Atty fees for divorce action is “support” and hence not dischargeable

In re Coil

[680 F2d 1170](#)

(7th Cir 1982)

- 4) Hold-harmless agreements not dischargeable if an integral and inseparable part of necessary maintenance and support for spouse and children; factors include

In re Woods

[561 F2d 27](#)

(7th Cir 1977)

Lyman v Lyman

[184 Wis. 2d 124](#)

(Ct. App. 1994)

- a. Whether settlement agreement includes maintenance to ex-spouse
- b. Whether there is any indication hold-harmless agreement was intended to balance relative incomes of parties
- c. Whether hold-harmless clause is in midst of provisions allocating property
 - Is debt characterized as property division or support under state law?
- d. Whether the hold-harmless provision describes the character and method of payment
 - Are payments extended over a period of time or in a lump sum?
- e. Whether amount or duration of payment can be altered upon change of circumstances
- f. Whether obligation terminates upon death or remarriage of recipient spouse
- g. Whether there was need for support at time of divorce and whether support would be inadequate absent obligation in question
- h. Age, health, educational level, work skills, earning capacity, and other financial resources of parties independent of obligation in question
- i. Whether one party relinquished right to support under state law in exchange for obligation in question
- j. Tax treatment of payments

Eckert v Eckert[144 Wis. 2d 770](#)

(Ct. App. 1988)

- 5) Discharge of property division obligations through bankruptcy may create substantial change of circumstances by increasing payer's ability to pay and increasing payee's need if unable to realize income or support from a substantial portion of share in marital estate
 - a. Domestic relations belongs to state and not federal law; overridden only if does major damage to clear and substantial federal interests
 - b. Because governed by support-based factors of [§_767.56](#), modification has a legitimate bearing on support considerations without doing major damage to "fresh start" interest of bankruptcy

10. Appeal

[§_785.03\(3\)](#)*Biel v Biel*[130 Wis. 2d 335](#)

(Ct. App. 1986)

- A. If CCC or Cty prosecutes contempt action,
appeal governed by rules for criminal appeals,
[§_809.30](#)**

**For More Complete Discussion of Contempt
Generally**

See Civil Volume

FA 5: OTHER ENFORCEMENT

1. General Authority

[§_767.77\(1\), \(1m\)](#)

- A. Ct may order any payment for support, maintenance, Atty fees, and paternity obligations to be paid in amounts and at times it considers expedient**

[§_767.77\(2\)](#)

- 1) Ct may impose liability for any payment
 - a. As charge on real estate
 - Not effective until certified copy of order or judgment recorded with register of deeds in Cty where property located
 - b. Require party to post sufficient surety

§_767.55(2)

- 2) If Ct orders child support, Ct may order noncustodial parent to register for a community work experience and job training program under §_49.36 if available in Cty of parent's residence or in Cty within reasonable driving distance from parent's residence

§_767.77(3)

B. Ct may enforce judgment for support, maintenance, paternity obligations, or Atty fees by any appropriate remedy

§_767.57(1h)

- 1) If support or maintenance payments not paid as required, CCC or Cty Child Support Agency (CSA) shall take proceedings deemed advisable to secure payment, including enforcement by contempt or other remedies

Griffin v Reeve

[141 Wis. 2d 699](#) (1987)

C. Ct retains jurisdiction to enforce past-due child support payments through contempt proceedings even when proceedings commenced after child reaches age of majority

See **Use of Contempt**, [FA 4](#), for procedure

2. Judicial Enforcement Remedies

A. Income withholding (assignment) effective immediately

See [Sec. 3](#) below

§_767.77(3)(c)

B. Money judgment for past-due payments

- 1) Judgment or order treated as final judgment

State v Hamilton

[2003 WI 50](#)

[261 Wis. 2d 458](#)

Cf. Johnson v Masters

[2013 WI 43](#)

[347 Wis. 2d 238](#)

- 2) Twenty-year statute of repose under §_893.40 for collection of child support arrearage begins to accrue from date of entry of last judgment establishing obligation

§_815.05(8)

- 3) Money judgments obtained in civil actions bear interest at annual rate equal to 1% plus prime rate in effect on January 1 of year in which judgment entered if judgment entered on or before June 30 of that year or in effect on July 1 of year in which judgment entered if judgment entered after June 30 of that year, as reported by Federal Reserve Board

§_767.511(6), (6m)

§_767.531

Greenwood v Greenwood

[129 Wis. 2d 388](#)

(Ct. App. 1986)

- a. Past-due child support obligations bear interest at .5% per month or 6% per year after first month

[§_767.77\(3\)\(f\)](#)

C. For failure to pay child support, lien may be placed on ships, boats, and vessels under [Ch 780](#)

[Ch 815](#)

D. Execution of order or judgment

[§_811.23](#)

E. Satisfaction out of any property attached under [Ch 811](#)

[Ch 812](#)

F. Garnishment

[§_49.855](#)

G. Interception of federal and state tax refunds

See [Sec. 4](#) below

[Ch 785](#)

H. Contempt

See Use of Contempt, [FA 4](#)

[§_948.22](#)

I. Criminal action for intentional failure to pay child or spousal support when obligor knows or should know of that legal obligation

- 1) Failure to pay for 120 consecutive days or more is a Class I felony
- 2) Failure to pay for less than 120 consecutive days is a Class A misdemeanor

St v Gantt

[201 Wis. 2d 206](#)

(Ct. App. 1996)

- 3) Wis has concurrent criminal jurisdiction with other states when obligor fails to obey Wis support order even though neither obligor nor child lived in Wis during charging period

J. See Action to Compel Maintenance or Support, [FA 19](#), for further details

3. Assignment (Income Withholding)

[§_767.75](#)

A. Upon entry of each order for support or maintenance, or approval of stipulation for child support, Ct shall provide notice of assignment to person from whom payer receives or will receive money

[§_767.75\(2r\)](#)

- 1) Unless Ct finds income withholding likely to cause payer irreparable harm or unless [§_767.76](#) applies

[§_767.75\(2r\)](#)

- 2) Notice of assignment by regular mail or by fax or other electronic means, to last-known address of person from whom payer receives or will receive money

Notice may be notice of Ct, by copy of executed assignment or by copy of part of Ct order directing payment

[§_767.75\(1f\)](#)

- 3) Assignment requires withholding for a fixed sum (regardless of whether the court-ordered obligation on which the assignment is based is expressed as a percentage of the employee's income), for an amount sufficient to ensure payments ordered, including any arrearages due at periodic rate not to exceed 50% of amount due so long as addition of amount toward arrearages does not leave payer at income below federal poverty line

[§_767.75\(2h\)](#)

- 4) Assignment need not require immediately effective withholding

[§_767.75\(1\)\(b\)](#)

[§_767.407\(6\)](#)

- 5) Assignment for payment of GAL fees apparently precluded by exclusion and alternate remedy for enforcement

[§_767.75\(4\)](#)

B. Attributes of withholding assignments

- 1) Have priority over other assignments, garnishment, and similar legal process under State law

[§_767.75\(1f\)](#)

- 2) Constitute assignment of all commissions, earnings, salaries, wages, pension benefits, income continuation insurance benefits under [§_40.62](#), duty disability benefits under [§_40.65](#), benefits under [Chs](#) 102 or 108, lottery prizes payable in installments, and other money due or to be due payer or to DCF (or designee)

[§_767.75\(6\)](#)

- 3) May not be used by employer

a. As basis for discharge of employee

b. As basis for denial of employment to a person

c. As basis for disciplinary action against employee

[§_767.75\(6\)\(a\), \(b\)](#)

- 4) Enforceable against employer/payer by contempt

[§_767.75\(2h\)](#)

C. When assignment not effective immediately

- 1) If payer fails to make required payment within 10 days after due date
- 2) Ct, CCC, or Cty CSA to send notice to payer that assignment in effect

a. Notice by regular mail

b. Sent to payer's last-known address

3) Payer may, within 10-day period, request hearing on assignment remaining in effect

4) Ct or CCC shall hold hearing within 10 working days after request

§_767.75(2h)

a. At hearing, if payer establishes assignment not proper because of mistake of fact, Ct or CCC may direct that assignment be withdrawn

§_767.75(2r)

5) If payer does not request hearing, Ct, CCC, or Cty CSA must send notice of assignment to person from whom payer receives or will receive money

§_767.75(2h)

6) CCC order reviewable by Ct with jurisdiction over action

a. On request of either party

b. If request made within 15 working days after CCC decision

§_767.75

D. Interstate income withholding

42 [USC](#) 666(b)

45 [CFR](#) 303.100

1) Assignment remedy may be used for interstate enforcement of orders

§_767.75(3h)

§_769.501

2) Person who receives notice of assignment under similar law of another state shall withhold amount specified in notice

a. Withholding shall apply to any money that person pays to payer later than one week after receipt of notice of assignment

b. Amount sent to DCF or designee

§_769.605

§_767.75(2r)

3) If Wis Ct or CCC receives notice of assignment for withholding required under law of another state or under a foreign support order

a. Wis Ct, CCC, or Cty CSA to send notice

- By regular mail or by fax or other electronic means
 - To last-known address of payer
- b. Notice to inform payer that assignment is in effect
- c. Payer may, within 20-day period, request a hearing on whether assignment should remain in effect
- Hearing held in Wis
 - Procedure as in [Sec. C.](#) above

4. Interception of Federal and State Tax Refunds

§_49.855
42 [USC](#) 664

A. DCF is central agency for administering tax intercept program in Wis

- 1) Available to AFDC/W-2 and non-AFDC/W-2 recipients alike
- 2) Used to collect past-due support payments
- 3) Federal tax intercept may be used only after other attempts to collect support have failed

§_49.855(1)
42 [USC](#) 664

B. DCF must certify delinquent support or maintenance payments to Wis Dept of Revenue or Federal Office of Child Support Enforcement (OCSE)

- 1) Federal OCSE then certifies debt to Internal Revenue Service (IRS)
- §_71.93(2)
- 2) At least 30 days before such certification, DCF must notify obligor of its intent to certify debt for tax setoff, and of obligor's right to appeal
- §_49.855
42 [USC](#) 664
- 3) Once debt certified, and Dept of Revenue or IRS determines that obligor otherwise entitled to tax refund or credit, Dept of Revenue or IRS must notify obligor of intent to reduce refund or credit by amount of support or maintenance owed

- 4) Within 20 days after Dept of Revenue or IRS notice, obligor may request a hearing before Ct that rendered the support or maintenance order
- 5) Within 10 days after receiving request for hearing, appealing either the DCF certification or Dept of Revenue or IRS notice of intent to reduce tax refund or credit, Ct shall set matter for hearing

a. Hearing before Ct or CCC

b. Issues to be heard

- Whether obligor owes amount certified
- If not, whether money withheld from state tax refund or credit should be paid to obligor, or held for future support or maintenance

45 [CFR](#) 303.72(h)

- For federal tax, refund or credit can only be applied to amount certified, cannot be held for future support or maintenance

Howard v Howard

[130 Wis. 2d 206](#)

(Ct. App. 1986)

c. Refund or credit may be used for arrearages even if payer under no current support obligation

d. Pending hearing and order, DCF prohibited from disbursing obligor's tax refund or credit

1997 Wis Act 191

5. Judicial Review of Administrative Remedies

A. Powers of DCF and CSA

[§_49.225](#)

1) Order genetic tests in paternity actions

[§_49.22\(2m\)](#)

2) Subpoena financial and other information to establish, modify, or enforce support order

3) With regard to delinquent support obligors

[§_49.854\(2\), \(6\), \(7\),](#)

(12)(a)

a. Impose liens to force sale of property; same priority as docketed judgment and effective for 5 years

[§_49.854\(4\), \(5\)](#)

b. Instruct financial institutions to freeze accounts

[§_49.852\(1m\)](#)

- c. Intercept lump-sum payments from public and private retirement funds

§_49.857

- d. Order denial, suspension, or nonrenewal of

- Driver's licenses
- Professional and occupational licenses
- Recreational licenses

§_49.22(11)

- 4) Disclose child support arrearage to consumer reporting agencies

B. Pension plan intercepts

§_49.852(1m)

- 1) DCF may direct any pension plan administrator to withhold amount specified in statewide support lien docket from a lump-sum payment due any delinquent obligor

§_49.852(2)(b)

- 2) Obligor has 20 business days to request Ct review

§_49.852(3)

- 3) Hearing conducted by initiating Ct (Ct that established original order) or CCC

- 4) Hearing to be scheduled within 10 business days after request

- 5) Ct to determine whether person owes amounts alleged

C. Delinquent support property liens

§_49.854(2)

- 1) Statewide support lien docket

- a. DCF to enter delinquent support payments on statewide support lien docket

- b. When entered, becomes lien in favor of DCF against all property owned by obligor

§_49.854(3)

- c. Notice to be provided to obligor when entered

§_49.854(2)(a)

- d. Lien not effective against good-faith purchaser of titled personal property unless lien recorded on title

- e. Two routes to judicial appeal

§_49.854(3)(ag)

- Via administrative financial records and Ct order review

§_49.854(3)(ar)

- Direct appeal

§_49.854(4), (11)

- f. If obligor neglects or refuses to pay, DCF may collect delinquencies and levy costs out of the seizure and sale of obligor's property

§_49.854(3)(ag)

2) Financial records and Ct order review

- a. Obligor must request administrative records and order review within 10 business days after date of notice of lien
- b. DCF has up to 60 days to review
- c. After review, appeal to initiating Ct or CCC within 5 business days after DCF's determination
- d. Hearing held within 15 business days after request
- e. Obligor to establish lien based on mistake of fact

§_49.854(3)(b)

- f. If before CCC, appeal to initiating Ct within 15 business days after CCC decision; no time limit on Ct hearing

§_49.854(3)(ar)

3) Direct Ct appeal

- a. In lieu of financial records and Ct order review method
- b. Request made within 20 business days after notice
- c. Hearing before initiating Ct or CCC scheduled within 10 days after request
- d. Obligor to establish lien based on mistake of fact

§_49.854(3)(b)

- e. If before CCC, appeal to initiating Ct within 15 business days after CCC decision; no time limit on Ct hearing

D. Freezing of financial accounts

§_49.854(5)

1) Obligor must request Ct review within 20 business days after notice

- 2) Initiating Ct or CCC to conduct hearing within 45 business days after request
- 3) Review limited to whether account holder owes amount certified and whether alternate payment arrangements offered by DCF or CSA reasonable
- 4) If written determination that alternative payment arrangements offered were not reasonable, Ct may order alternative payment arrangement
- 5) If Ct or CCC finds for obligor, DCF to return property
- 6) If hearing before CCC, appeal to initiating Ct within 15 business days after CCC decision; no time limit on Ct hearing
- 7) For joint owner's appeal rights, see [Sec. G.](#) below

§_49.854(6)

E. Seizure of other personal property

- 1) Obligor must request Ct review within 20 business days after notice
- 2) Initiating Ct or CCC to schedule hearing within 10 business days after request
- 3) Review limited to whether account holder owes amount certified and whether alternate payment arrangements offered by DCF or CSA reasonable
- 4) If written determination that alternative payment arrangements offered were not reasonable, Ct may order alternative payment arrangement
- 5) If Ct or CCC finds for obligor, DCF to return property within 15 business days
- 6) If hearing before CCC, appeal to initiating Ct within 15 business days after CCC decision; no time limit on Ct hearing
- 7) For joint owner's appeal rights, see [Sec. G.](#) below

§_49.854(7)

F. Seizure of real estate

- 1) Obligor or other with interest in property may request Ct review within 20 business days after notice

- 2) Ct or CCC to schedule hearing within 10 business days after request
- 3) Obligor's review limited to whether account holder owes amount certified and whether alternate payment arrangements offered by DCF or CSA reasonable
- 4) If written determination that alternative payment arrangements offered were not reasonable, Ct may order alternative payment arrangement
- 5) If Ct or CCC finds for obligor, Ct to order DCF not to proceed with levy
- 6) If hearing before CCC, appeal to initiating Ct within 15 business days after CCC decision; no time limit on Ct hearing
- 7) For joint owner's appeal rights, see [Sec. G.](#) below

[§_49.854\(7m\)](#)

G. Joint ownership interests

- 1) Person claiming joint interest in property must request hearing within 20 business days after notice
- 2) Initiating Ct or CCC to schedule hearing within 10 days after receiving request
- 3) Other requests for review on same property may be heard together
- 4) Person claiming joint interest has clear and convincing burden to prove that portion of property or account attributable to that person's net contributions to it
- 5) If hearing before CCC, appeal to initiating Ct within 15 days after CCC decision; no time limit on Ct hearing

[§_49.856](#)

H. Support obligor's interest in judgment or settlement

- 1) DCF may seek payment of delinquent payment or outstanding amount on statewide support lien docket out of obligor's proceeds from any judgment or settlement
- 2) Obligor may seek Ct review by request made within 20 business days after notice
- 3) Initiating Ct or CCC to schedule hearing within 10 business days after receiving request
- 4) Only issue at hearing is whether obligor owes the delinquent payment or outstanding amount specified in statewide support lien docket

§_49.858(3)

- 5) If hearing before CCC, appeal to initiating Ct within 15 business days after CCC decision; no time limit on Ct hearing

I. Ct review of action against license

§_49.857(1)(d)

- 1) “License” includes licenses, permits, certificates, or registrations

§_49.857(3)(a)5.

- 2) Obligor may seek Ct review by request made within 20 business days after notice

§_49.857(3)(ac)1.

- 3) Initiating Ct or CCC to schedule hearing within 10 days after receiving request

- 4) Only issue at hearing is whether obligor is delinquent in making support payments and whether any alternative payment arrangements offered by DCF or CSA reasonable

§_49.857(3)(ac)3.

- 5) If written determination that alternative payment arrangements offered were not reasonable, Ct may order alternative payment arrangement

§_49.857(3)(am)

- 6) DCF must give second notice if obligor does not appeal or pay; same appeal rights apply

6. Summary of Administrative Remedies

A. See table on following page

CHILD SUPPORT ENFORCEMENT REVIEW HEARINGS

	Pension Intercepts	Property Lien		Property Seizure		Real Estate	Joint Ownership	Judgment/ Settlement	Licenses
		From Adm	Direct	Financial Assets	Other Personal				
Time to Appeal Agency	20 Business Days	5 Business Days	20 Business Days	20 Business Days	20 Business Days	20 Business Days	20 Business Days	20 Business Days	20 Business Days
Who Hears	Court or CCC	Court or CCC	Court or CCC	Court or CCC	Court or CCC	Court or CCC	Court or CCC	Court or CCC	Court or CCC
Notice of Hearing by	10 Business Days		10 Business Days	10 Business Days	10 Business Days	10 Business Days	10 Business Days	10 Business Days	10 Business Days
Time to Hold Hrg	None	15 Business Days	None	45 Business Days	None	None	None	None	None
Issue(s) Limited to	Whether person owes amount specified in statewide support lien docket	Whether lien based on a mistake of fact		Whether obligor owes amount certified and whether any alternative payment plan offered by DCF or CSA was reasonable. Written decision if DCF or CSA alternate payment plan is found unreasonable.			What portion of property or account attributable to joint owner's net contribution	Whether obligor owes amount specified in statewide support lien docket	Whether obligor is delinquent and whether alternate payment plan is reasonable
Burden of Proof	Obligor	Obligor	Obligor	Obligor	Obligor	Obligor	Joint owner by clear & convincing evidence	Obligor	Obligor
Time to Appeal from CCC	15 Business Days	15 Business Days	15 Business Days	15 Business Days	15 Business Days	15 Business Days	15 Business Days	15 Business Days	15 Business Days
Court Hearing Time	None	None	None	None	None	None	None	None	None
Statute	§ 49.852	§ 49.854(3)	§ 49.854(3)	§ 49.854(5)	§ 49.854(6)	§ 49.854(7)	§ 49.854(7m)	§ 49.856	§ 49.857

FA 6: UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA)

1. General Provisions

§ 769.101(3)

A. Coverage and definitions

1) “Duty of support” includes duty imposed or imposable by law

a. Includes “an unsatisfied obligation to provide support” (i.e., arrearage)

b. Applies to support for child, spouse, or former spouse

§ 769.101(1)

c. “Child” is an individual, who may be an adult, who is a beneficiary of a support order directed to the individual’s parent

§ 769.101(21)

2) “Support order” is judgment, decree, order, decision, or directive for benefit of a child, spouse, or former spouse

a. Includes temporary and final orders, including those subject to modification

b. Order provides for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an obligee in place of child support

c. May also cover related costs, fees, interest, income withholding, automatic adjustment, reasonable Atty fees, and other relief

§ 769.101(13)

3) “Obligor” is an individual or the estate of a decedent who

a. Owes or is alleged to owe a duty of support or

b. Is alleged to be but has not been adjudicated the parent of a child or

c. Is liable under a support order or

d. Or is a debtor in a proceeding under [Ch 769](#) Subch VII ([§ 769.701–.713](#))

B. Types of enforcement

1) Direct enforcement of income withholding orders

2) Petition for enforcement of support obligation

3) Petition to establish support obligation

- a. Determine parentage
 - b. Establish support order
- 4) Registration of support orders

2. Jurisdiction

§_769.205(1)

A. State issuing support order retains continuing, exclusive jurisdiction to modify its child support order if the order is the controlling order, and

- 1) At time of filing request for modification, the state is residence of obligor, obligee, or child for whose benefit support order was issued or
- 2) If parties consent in a record or in open Ct that Wis Ct may continue to exercise jurisdiction to modify its order

§_769.205(2)

B. Wis loses jurisdiction and may not exercise continuing, exclusive jurisdiction to modify its order if either

- 1) All individual parties file consent in a record with Wis Ct that another state's Ct that has jurisdiction over at least one party who is an individual or who is located in child's state of residence may modify order and assume continuing, exclusive jurisdiction, or
- 2) Wis Ct's order is not the controlling order

§_769.205(5)

- 3) Wis does not lose continuing, exclusive jurisdiction to, nor obtain jurisdiction by, a temporary support order issued ex parte or pending resolution of a jurisdictional conflict

- a. *Kranz v Kranz*, [189 Wis. 2d 370](#) (Ct. App. 1994), does not apply to UIFSA (applied to Revised Uniform Reciprocal Enforcement of Support Act (RURESA))

§_769.205(3)

C. After loss of jurisdiction, when Ct of another state modifies order, Wis Ct must recognize continuing, exclusive jurisdiction of the other state's Ct

§_769.205(4)

- 1) But Wis Ct still may serve as an initiating Ct to request the other state's Ct to modify a support order issued in that state

§_769.207

D. Conflicting child support orders to be resolved by the following rules

- 1) If only one order issued, that order must be recognized and that state accorded continuing, exclusive jurisdiction
- 2) If only one state has continuing, exclusive jurisdiction, the order of that state is controlling and must be recognized
- 3) If there is more than one order from more than one state, each of which has continuing, exclusive jurisdiction
 - a. Current home state of child is controlling and must be recognized
 - b. If no order in current home state of child, then order most recently issued is controlling and must be recognized
- 4) If no Ct would have continuing, exclusive jurisdiction, Wis Ct must issue child support order, which is controlling and must be recognized
- 5) Any Ct that determines which order is controlling or issues a new child support order shall include
 - a. Basis of its determination
 - b. Amount of any prospective support
 - c. Total amount of any consolidated arrears and accrued interest
- 6) Party that obtained order must file certified copy with each tribunal that had issued or registered an earlier support order
 - a. Failure to file within 30 days after issuance of order subjects party to sanctions in Ct in which issue arises but does not affect validity or enforceability of the controlling child support order

§_769.208

E. Child support orders for two or more children of same obligor issued by Wis and another state or a foreign country, shall be enforced in the same manner as if the orders had been issued in Wis

§_769.201(1m)

F. Wis Ct has jurisdiction over nonresident if any of the following applies

- 1) Individual is personally served with summons or other notice in Wis
- 2) Individual submits to jurisdiction by consent, by entering a general appearance, or by filing a responsive pleading
- 3) Individual resided with child in Wis
- 4) Individual resided in Wis and provided prenatal expenses or support for child

- 5) Child resides in Wis as a result of acts or directives of the individual
- 6) Individual engaged in sexual intercourse in Wis and child may have been conceived by that act

DMK v JB
(Paternity of CAK)
[159 Wis. 2d 224](#)
 (Ct. App. 1990)

- a. Predecessor statute held not to violate Due Process Clause

- 7) Individual asserted parentage of a child in filed declaration of paternity under [§_48.025](#) or statement acknowledging paternity under [§_69.15\(3\)\(b\)1.](#) or 3.
- 8) Individual was conclusively determined from genetic test results to be father under [§_767.804](#)
- 9) Other basis consistent with Wis and US Constitutions for the exercise of personal jurisdiction

[§_769.204](#)

G. Simultaneous proceedings

- 1) Wis Ct may exercise jurisdiction to establish support if pleadings have been filed in another state or a foreign country only if all of the following apply
 - a. Pleading in Wis filed before expiration of time allowed in other state or foreign country for filing a responsive pleading challenging jurisdiction by other state or foreign country, and
 - b. Contesting party timely challenges exercise of jurisdiction in other state or foreign country, and
 - c. If relevant, Wis is home state of child
- 2) Wis Ct may not exercise jurisdiction if the reverse of above is true

3. Direct Enforcement

[§_769.501](#), [§_769.502](#)

A. Income-withholding order of another state may be sent by or on behalf of obligee or by support enforcement agency to obligor's employer or other debtor, as specified in [§_767.75\(1f\)](#), in Wis who shall do the following

- 1) If order appears regular on its face, treat same as an income-withholding order of Wis
- 2) Immediately provide copy to obligor

- 3) Distribute funds as directed in the withholding order and as noted in statute

§_769.506

B. Contest validity of income-withholding order by registering order in Wis Ct and filing contest to that order under [Ch 769 Subch VI](#), or otherwise contesting order in same manner as if order issued in Wis

- 1) Obligor shall provide notice to all of the following
 - a. Any support enforcement agency providing services to oblige
 - b. Each employer that has directly received income-withholding order
 - c. Person designated to receive payments in income-withholding order, or
 - d. If no person designated, the oblige

§_769.507

C. Administrative enforcement of support order or income-withholding order may occur if

- 1) Party or support enforcement agency seeking enforcement sends documents required for registration of order to CSA of Wis, and
- 2) Obligor does not contest administrative enforcement of order of other state or foreign support order

§_769.507

D. If obligor contests validity or administrative enforcement of order, CSA to register the order as provided under UIFSA

4. Petition for Enforcement

§_769.311

A. Verified petition and accompanying documents must contain the following, so far as known

- 1) Names, residential addresses, and Social Security numbers of both obligor and oblige
- 2) Name, sex, residential address, Social Security number, and date of birth for each child for whose benefit support sought

§_769.312

B. Nondisclosure

- 1) If a party alleges in an affidavit or a pleading under oath that health, safety, or liberty of party or child would be jeopardized by disclosure of specific identifying information, that information must be sealed and must not be disclosed to the other party or the public
- 2) After a hearing in which Ct takes into consideration the health, safety, or liberty of the party or child, the Ct may order disclosure of information that Ct determines to be in the interest of justice

§_769.305(1)

C. Responding Ct, upon receipt of petition, shall

- 1) Cause petition or other pleading to be filed
- 2) Notify petitioner where and when it was filed

§_769.305(2)

D. Responding Ct has power to

- 1) Establish or enforce a support order, modify a child support order, determine the controlling child support order, or determine parentage of a child
- 2) Order obligor to comply, specifying amount and manner of compliance
- 3) Order income withholding
- 4) Determine amount of arrearage and specify manner of payment
- 5) Enforce orders by civil or criminal contempt, or both
- 6) Set aside property for the satisfaction of the support order
- 7) Place liens or order execution on the obligor's property
- 8) Order obligor to keep Ct informed of residential address, e-mail address, and telephone number, together with name, address, and phone number of employer
- 9) Issue an order of arrest under §_818.02(6) when obligor fails to appear after proper notice of a hearing
- 10) Order obligor to seek work by specified methods
- 11) Award reasonable Atty fees and other fees and costs

12) Grant any other available remedy

§_769.317

E. Communications between Cts

- 1) Wis Ct may communicate with Ct outside Wis in a record, or by telephone, e-mail, or other means, to obtain information concerning
 - a. Laws
 - b. Legal effect of a judgment, decree, or order, and
 - c. Status of a proceeding

§_769.318

F. Discovery

- 1) Wis Ct may request assistance of non-Wis Ct in obtaining discovery and, upon request, shall provide assistance to non-Wis Ct in obtaining discovery

G. Special evidentiary rules

§_769.316(2)

- 1) Affidavit, a document substantially complying with federal forms, or a document incorporated by reference, not excluded under hearsay, if given in person is admissible if given under penalty of perjury by a party or witness residing outside Wis

§_769.316(3)

- 2) Certified copy of record of support payments is admissible as to facts asserted in it and to show whether payments were made

§_769.316(4)

- 3) Copies of bills for below items are admissible to prove the amounts and that they were reasonable, necessary, and customary, if provided to adverse party at least 10 days before trial
 - a. Genetic testing
 - b. Prenatal and postnatal health care
 - c. Reports of Medical Assistance payments

§_769.316(5)

- 4) Documentary evidence transmitted by telephone, telecopier, or other electronic means that do not provide an original record cannot be excluded from evidence based on method of transmission

§_769.316(6)

- 5) Wis Ct must permit party or witness residing outside Wis to be deposed or testify by telephone, audiovisual means, or other electronic means

§_769.316(7)

- 6) Party refusing to testify on ground that testimony might be self-incriminating permits trier of fact to draw an adverse influence from that refusal

§_769.316(8), (9)

- 7) Privilege against disclosure of communication between spouses and defense of immunity between spouses or parent and child does not apply to proceedings under UIFSA

§_769.315

- 8) A party whose paternity has been previously determined by or under law may not plead nonparentage as a defense

§_769.313

H. Fees and costs

- 1) Petitioner cannot be required to pay filing fee or other costs
- 2) If obligee prevails, Wis Ct may assess against the obligor filing fees, reasonable Atty fees, other costs and necessary travel, and other reasonable expenses incurred by obligee and obligee's witnesses
- 3) Atty fees may be assessed as costs and ordered paid directly to Atty who may enforce the order in Atty's own name
- 4) May not assess fees, costs, or expenses against obligee or support enforcement agency
- 5) Payment of support takes priority over payment of other fees or costs
- 6) Ct shall order payment of costs and reasonable Atty fees if hearing was requested for purposes of delay; purpose of delay presumed if registered support order is confirmed or enforced without change

§_769.314

I. Limited immunity of petitioner

- 1) Participation in a [Ch](#) 769 proceeding by petitioner, personally or through counsel, does not confer personal jurisdiction over petitioner in another proceeding
- 2) Petitioner not amenable to service of civil process while physically present in Wis to participate in a proceeding under UIFSA
- 3) Immunity does not extend to civil litigation based on acts unrelated to proceedings under UIFSA committed by party while physically present in Wis to participate in UIFSA proceeding

5. Petitions to Establish Support Obligation or Determine Parentage

[§_769.401](#)**A. Petition to establish support order**

- 1) If support order entitled to recognition under UIFSA has not been issued, responding Wis Ct with personal jurisdiction over the parties may issue support order if any of following applies
 - a. Individual seeking order resides outside Wis
 - b. Support enforcement agency seeking order is located outside Wis
- 2) Ct may issue temporary support order if Ct determines that order is appropriate and if individual who is ordered to pay is any of following:
 - a. Presumed father of the child
 - b. Individual who is petitioning to have paternity adjudicated
 - c. Individual who has been identified as the father of the child through genetic testing
 - d. Alleged father of the child who has declined to submit to genetic testing
 - e. Individual who has been shown by clear and convincing evidence to be the father of the child
 - f. Individual who has acknowledged paternity under [§_767.805](#)
 - g. Child's mother
 - h. Individual who has been ordered to pay child support in previous proceeding and order has not been reversed or vacated
- 3) After hearing upon notice, if Ct finds that obligor owes duty of support, Ct shall issue support order
- 4) May also issue other orders under [§_769.305](#)

[§_769.402](#)**B. Determination of Parentage**

- 1) Wis Ct that is authorized to determine parentage may serve as responding Ct in proceeding to determine parentage of child brought under [Ch 769](#) or under substantially similar law or procedure

6. Registered Support Orders

§_769.602

A. Support order of another state or a foreign support order may be registered in Wis upon receipt of following records

- 1) Letter of transmittal requesting registration and enforcement
- 2) One certified and one other copy of all orders to be registered, including modification orders
- 3) Sworn statement by person requesting registration or certified statement by records custodian showing amount of any arrearage
- 4) Information as known regarding obligor
 - a. Name, address, and Social Security number
 - b. Name and address of obligor's employer and any other source of income to obligor
 - c. Description and location of any property of the obligor located in Wis not exempt from execution
- 5) Unless nondisclosure ordered, name and address of obligee and, if applicable, of agency or person to whom support payments to be remitted

§_769.603

B. Upon registration, Ct must give notice to nonregistering party

- 1) Accompanied by copy of registered order(s) and amount of alleged arrearage
- 2) To include information on time and procedures to contest registration and effect of failure to timely contest

§_769.603

C. Effect of registration

- 1) Registered support order enforceable in same manner and subject to same procedure as order issued in Wis
- 2) Unless otherwise authorized under UIFSA, Wis Ct must recognize and enforce but may not modify a registered support order

§_769.604(1)

- 3) Law of issuing state or foreign country governs all of the following

- a. Nature, extent, amount, and duration of current payments under a registered support order
- b. Computation and payment of arrearages and accrual of interest on the arrearages under the support order
- c. Existence and satisfaction of other obligations under the support order

§_769.606(2)

- 4) Unless timely contested, becomes a confirmed order by operation of law

§_769.602(3)

- 5) Petition or comparable pleading seeking enforcement and specifying grounds for remedy must be affirmatively sought at the time of request for registration or later

D. Contesting registration of order

§_769.606

- 1) Nonregistering party may contest by requesting a hearing within time required by §_769.605: 20 days after date of mailing or personal service of notice of registration (unless registration is under §_769.707)
- 2) If contested, Ct shall schedule hearing and give notice to the parties of date, time, and place of hearing

Halko v Halko
[2005 WI App 99](#)
[281 Wis. 2d 825](#)

- a. Wisconsin discovery rules and sanctions apply

§_769.607

- 3) Party contesting has burden of proving one or more of the following defenses
 - a. Issuing Ct lacked personal jurisdiction over contesting party
 - b. Order was obtained by fraud
 - c. Order has been vacated, suspended, or modified by a later order
 - d. Issuing Ct has stayed the order pending appeal
 - e. There is a defense under Wis law to remedy sought
 - f. Full or partial payment has been made
 - g. Statute of limitation under §_769.604(2) (the later of the statute of the issuing state/country or the receiving state) has elapsed

h. Alleged controlling order is not the controlling order

4) If evidence establishes full or partial defense, Ct may

a. Stay enforcement of order

b. Continue the proceeding to produce other relevant evidence or

c. Issue other appropriate orders

5) An uncontested part of the order may be enforced by all appropriate remedies

6) If contesting party fails to establish a defense, Ct must issue an order confirming the registered order

§_769.608

E. Confirmed order

1) Confirmation precludes further contest of order with respect to any matter that could have been asserted at time of registration

2) Applies whether by contest or by operation of law

F. Modification of registered order

§_769.609

1) Party or support enforcement agency seeking to modify order may petition for modification at time of registration of an order or later

2) Petition must state grounds for modification

§_769.611

3) Wis Ct may modify registered order only if, after notice and hearing, it finds

a. That neither child, nor individual obligee, nor the obligor resides in the issuing state, petitioner is a nonresident of Wis and seeks modification, and respondent is subject to the personal jurisdiction of Wis Ct, or

b. That Wis is the residence of the child, or an individual party is subject to personal jurisdiction of Wis Ct, and that all individual parties have filed consents in a record in issuing Ct permitting Wis Ct to modify and assume continuing, exclusive jurisdiction

§_769.613

4) Wis has jurisdiction to modify order of another state if

- a. All parties who are individuals reside in Wis, and
 - b. Child does not reside in issuing state
- 5) Modification is subject to same requirements, procedures, and defenses as apply to the modification of an order issued in Wis and enforced in the same manner
- 6) Ct obtains continuing, exclusive jurisdiction upon issuance of an order modifying child support order issued in another state
- §_769.614
- 7) Party obtaining modification shall, within 30 days, file certified copy of order with issuing tribunal and each subsequent registering tribunal
- §_769.612

G. Recognition of order modified in another state

- 1) If a non-Wis Ct modifies a Wis Ct's earlier support order under UIFSA, then all of the following apply to a Wis Ct:
- a. Wis Ct may enforce earlier order only as to arrearages and interest accruing before modification
 - b. Wis Ct may provide other relief only for violations that occurred before effective date of modification
 - c. Wis Ct must recognize modifying order of another state, upon registration, for purposes of enforcement
- §_769.801

7. Interstate Rendition (Extradition)

- A. Governors may make demand for surrender of individual found in another state who is criminally charged in demanding state for failure to provide for the support of an oblige**
- B. Extradition of individuals not inconsistent with UIFSA applies to demand even if individual was not in demanding state when crime was allegedly committed and has not fled from that state**

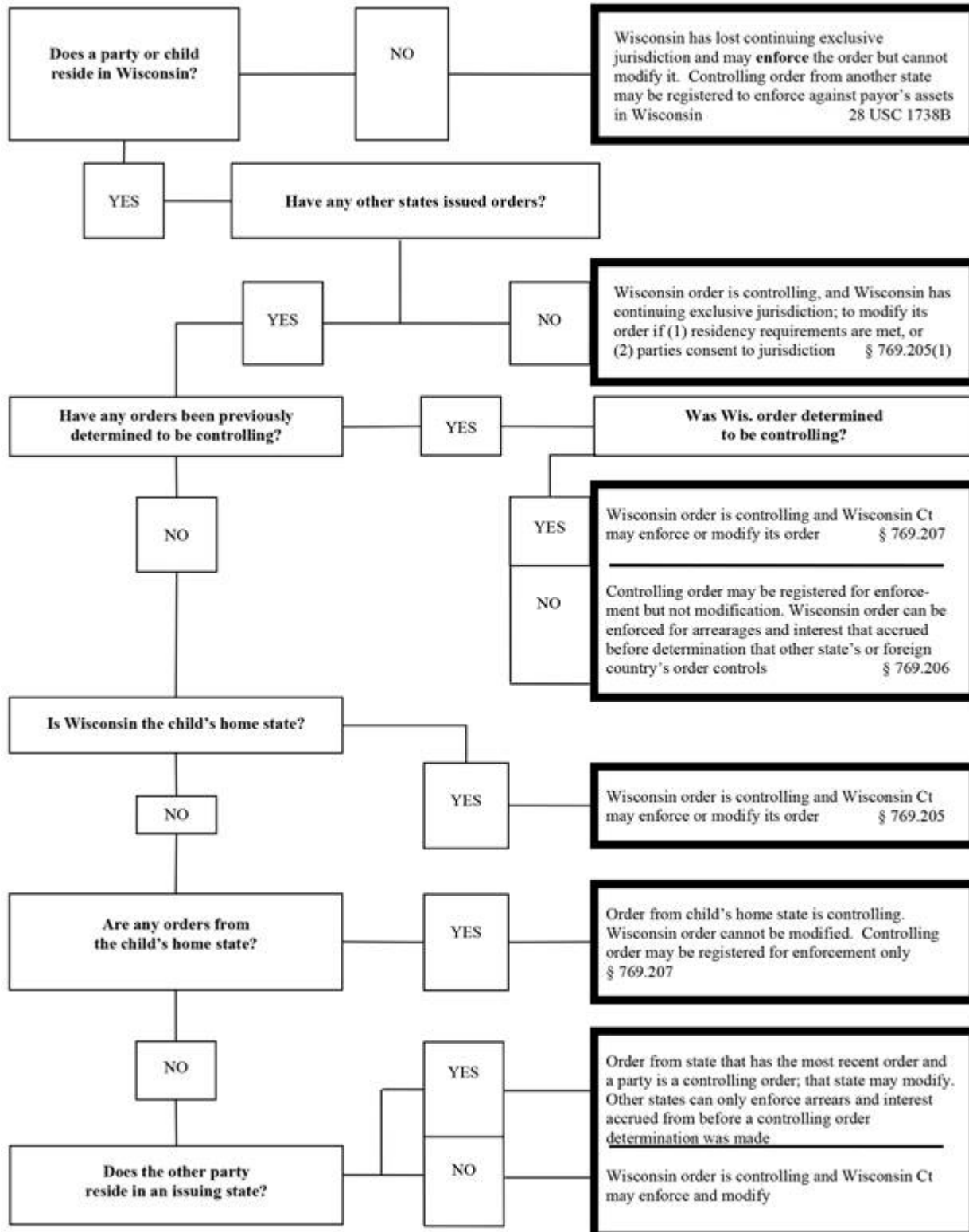
8. Judicial Bench Cards for UIFSA Cases

Judicial bench cards for use in UIFSA cases are available at <https://www.acf.hhs.gov/css/resource/judicial-bench-cards-for-uifsa-and-hague-convention-cases> (last reviewed Aug. 7, 2023)

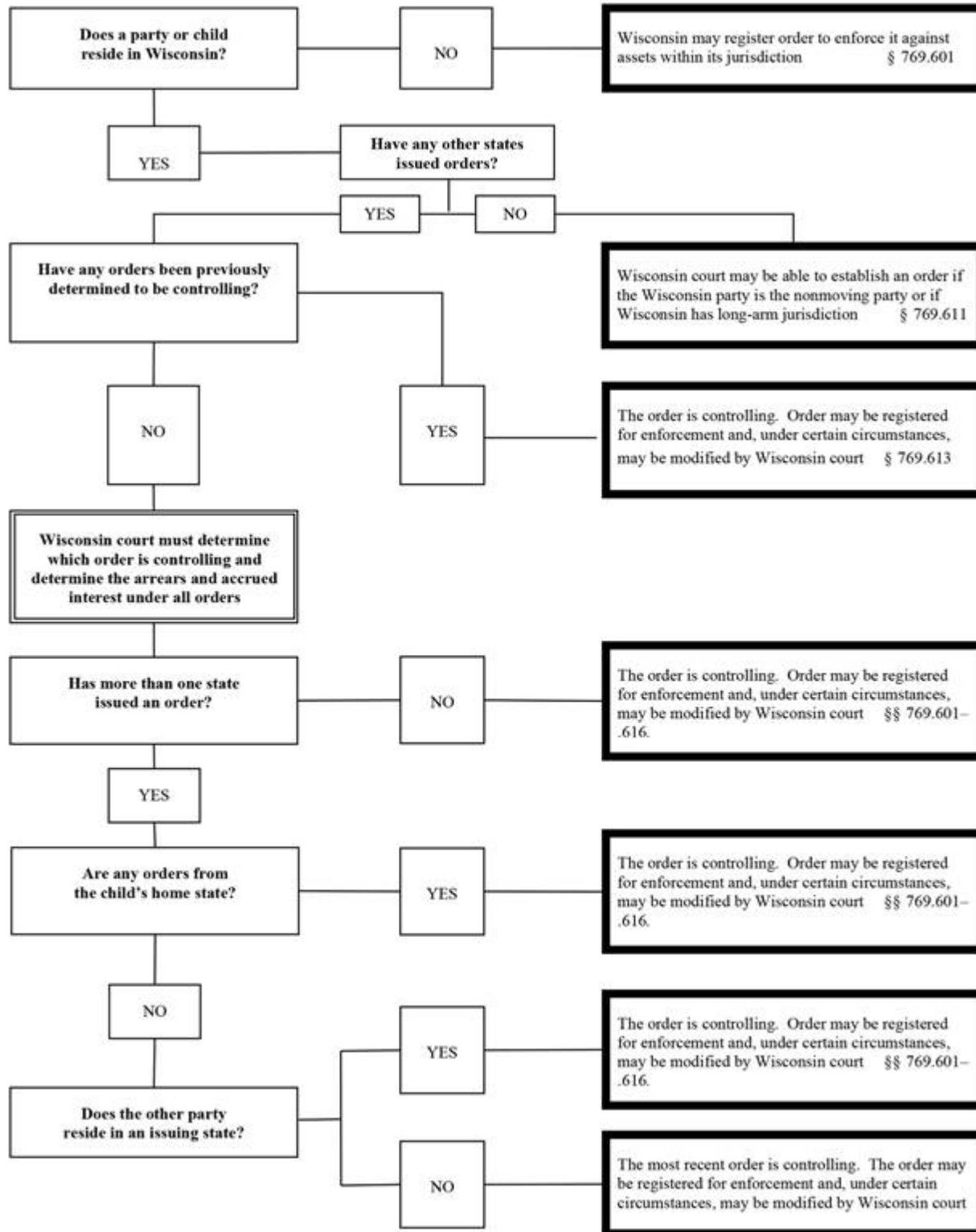
9. Orders Under UIFSA Flowchart

WISCONSIN HAS AN ORDER

Or



WISCONSIN DOES NOT HAVE AN ORDER



Note: Controlling order may be registered for modification if nonmoving party is resident of Wis or if all parties have consented in a record or in open court, in jurisdiction that issued the order, that Wis may assume continuing, exclusive jurisdiction.

FA 7: TAX CHECKLIST

1. Property Division

[IRC](#) § 1041

[Treas. Reg.](#) § 1.1041-1T

A. Transfers of property “incident to divorce” are nontaxable events

- 1) If within one year after divorce, or
- 2) Related to cessation of marriage
 - a. Pursuant to divorce or separation agreement, order or judgment, and
 - b. Transfer occurs within 6 years after divorce
- 3) Transfers not meeting above criteria are presumed unrelated to cessation of marriage, but presumption is rebuttable

Krueger v

Wis Dept of Rev

[124 Wis. 2d 453](#) (1985)

- 4) Basis is carried over from transferor to transferee

Ondrasek v Ondrasek

[126 Wis. 2d 469](#)

(Ct. App. 1985)

- 5) Cannot discount value of property by capital gains tax that will be paid if sale of property is hypothetical or theoretical

B. Property division payout is dischargeable in bankruptcy

Lyman v Lyman

[184 Wis. 2d 124](#)

(Ct. App. 1994)

See *Lyman* case for factors to be used in deciding whether debt is property division or support obligation

2. Maintenance

Pub L No 115-97,
§ 11051, 131 Stat 2054,
2089–90 (2017)

NOTE: Federal income tax changes repealed the payer's tax deduction under [IRC](#) § 215 for alimony payments (maintenance in Wisconsin) and the requirement under [IRC](#) §§ 61(a)(8) and 71 that alimony be included in the payee's income. Implementation of the repeal applies to judgments after December 31, 2018. For judgments entered before the December 31, 2018 effective date, the prior law continues to apply. A preexisting judgment modified after December 31, 2018, will retain its status under the old law unless the modification expressly provides it is governed by the new law.

VanderPerren v
VanderPerren
[105 Wis. 2d 219](#) (1982)

A. Income to recipient, deductible to payer IF

[IRC](#) §§ 71, 215, *repealed*
by Pub L No 115-97,
§ 11051
131 Stat 2054 (2017)
[Treas. Reg.](#) § 1.71-1T

1) Paid in cash

Payments may be made to third party, such as Atty, medical insurance carrier, school, etc., and still be taxable to payee spouse as maintenance and deductible to payer spouse

2) Under divorce or separation agreement, temporary order, or final decree

[Treas. Reg.](#) § 1.71-1(b)(3)

Payments made pursuant to a preliminary or interlocutory decree of divorce qualify

3) Parties do not live in same household (one-month grace period allowed)

[IRC](#) § 71(e), *repealed by*
Pub L No 115-97,
§ 11051
131 Stat 2054 (2017)

However, if parties live apart but are not divorced, and file joint return, payments are not deductible by one or includible in other's income

4) Instrument must not state payments are not to be treated as alimony

Even if payment qualifies as alimony in all other respects, it will not be treated as such if instrument specifies it is not to be accorded that status

[IRC](#) § 71, *repealed by*
Pub L No 115-97,
§ 11051
131 Stat 2054 (2017)

5) Instrument must state that payments do not extend past death of payee spouse

- a. Order does not have to state that maintenance does not extend beyond death of payer spouse if terminates under State law

[§ 767.56\(2c\)](#)

- b. Under Wis law, maintenance terminates at death unless terminated for another reason (e.g., remarriage, Ct order)

Comment

- c. Good practice is for agreement or order to state that payments terminate upon death of payee spouse

B. Parties may elect to make payments not taxable to recipient and not deductible to payer, or Ct may so order

C. Temporary maintenance

Hunt v Comm'r
[22 TC 228](#) (1954), *acq*,
1954-2 CB 4

Only amount of temporary maintenance that exceeds one-half total income of both spouses is taxable to recipient, deductible to payer

D. Maintenance obligation not dischargeable in bankruptcy

3. Child Support

[IRC](#) § 152
[Treas. Reg.](#) § 1.152-4

A. Support payments not deductible to payer; not income to payee

[IRC](#) § 71(c), *repealed by*
 Pub L No 115-97,
 § 11051
 131 Stat 2054 (2017)

B. To qualify as child support, amount must generally be specifically identified as child support

[IRC](#) § 71(c)(1), *repealed*
 by Pub L No 115-97,
 § 11051
 131 Stat 2054 (2017)
[Treas. Reg.](#) § 1.71-1T

Payment for support of “spouse and child” without more, will qualify as alimony in its entirety since portion allocable to child not specified

C. Allocation of dependency exemption

[§ 767.511\(1\)\(b\)](#)

- 1) Parties shall stipulate which one will claim child as an exemption for federal income tax purposes under [IRC](#) § 151(c), or as an exemption for state income tax purposes under the law of another state. Tax exemptions still need to be allocated for utilization of the child tax credit. The method for allocating the exemption is to require the party not claiming the exemption to execute IRS Form 8332
- 2) If parties unable to stipulate, Ct to make decision in accordance with State and federal tax laws

[IRC](#) § 152(e)(2)
 IRS Pub 501

- 3) If Ct allocates dependency exemption to noncustodial parent, custodial parent must transfer exemption to noncustodial parent by executing IRS Form 8332 and giving it to noncustodian to file with tax return

[Treas. Reg.](#) § 1.152-4

- a. For post–July 3, 2008 divorce decrees, a custodial parent’s personal dependency exemption release for a minor child must be given to the noncustodial parent in a separate, signed Form 8332 for each tax year, to file with the noncustodian’s tax return
- b. For pre–July 3, 2008 divorce decrees, a noncustodial parent may still attach pages of a divorce decree without a Form 8332, but only if the pages constitute a statement substantially similar to Form 8332 in effect at the time of entry of judgment
- c. For all decrees, however, including pre– and post–July 3, 2008 decrees, if any conditions must be met on claiming the exemption—for example, being current in child support—attaching pages of a divorce judgment

will not be sufficient to claim the exemption, and a signed Form 8332 is necessary

Pergolski v Pergolski

[143 Wis. 2d 166](#)

(Ct. App. 1988)

- d. Ct must order custodial parent to sign waiver (Form 8332) so noncustodial parent may take the exemption
- e. The Affordable Care Act (ACA) may financially affect a party providing health care unable to claim a dependency exemption post-divorce in a way that cannot be predicted when the divorce is granted. Ct may wish to reserve jurisdiction to consider a motion to change the dependency exemption for this reason. *See also* [FA 10, Sec. 10](#) (Support Order)

D. Dependency exemption not necessary to get head of household status or child care credit

E. Medical expenses can be deducted by parent who pays, regardless of which party entitled to claim dependency exemption

F. Child support not dischargeable in bankruptcy. *See infra* [Sec. 5](#)

4. Bankruptcy

11 [USC](#) 523(a)(5), (15)

A. Discharge does not apply to “Domestic Support Obligation” or other debts incurred during course of divorce

11 [USC](#) 101(14A)

B.

“Domestic Support Obligation”

- 1) Amount owed to spouse, former spouse, child or such child’s parent, legal guardian, or other responsible relative, or a governmental unit
- 2) Obligation is in the nature of alimony, maintenance, or support, and is established under any separation agreement, divorce decree, property settlement agreement, court order, or governmental unit determination

C. Other debts incurred during course of divorce

11 [USC](#) 523(a)(15)

- 1) Obligation is not a domestic support obligation under 11 [USC](#) 523(a)(5), but is incurred by debtor to spouse, former spouse, or child in the course of divorce or separation or in connection with separation agreement, divorce decree, or other court order, or governmental unit determination

5. Tax Calculations

Bisone v Bisone

[165 Wis. 2d 114](#)

(Ct. App. 1991)

A. Use of tax calculations generated by computer programs permitted if

- 1) Inputted data is in accord with the law
- 2) Inputted factual findings are not clearly erroneous
- 3) Parties have sufficient opportunity to challenge

Rumpff v Rumpff

[2004 WI App 197](#)

[276 Wis. 2d 606](#)

B. But when no expert testimony presented, Ct may rely on own knowledge and experience to engage in reasonable speculation about anticipated tax impact on present value of retirement assets. See [FA8—Property Division, Sec. 5.J., Tax Consequences](#)

FA 8: PROPERTY DIVISION

1. Prenuptial and Postnuptial Marital Property Agreements

[§_767.215\(2\)\(e\)](#)

A. Any written agreement must be attached to the divorce petition

[§_767.56\(1c\)\(h\)](#)

[§_767.61\(3\)\(L\)](#)

B. May apply to maintenance and/or property division

Levy v Levy

[130 Wis. 2d 523](#) (1986)

C. If agreement applies to financial issue at death only, the agreement does not apply to financial issues in divorce

Button v Button

[131 Wis. 2d 84](#) (1986)

D. Agreement must be equitable to be binding

Gardner v Gardner

[190 Wis. 2d 216](#)

(Ct. App. 1994)

- 1) Procedural fairness: Each spouse must have made a fair and reasonable financial disclosure when agreement made; and

Brandt v Brandt

[145 Wis. 2d 394](#)

(Ct. App. 1988)

- 2) Substantive fairness: Provisions must be fair to the parties at the time of divorce

2. Disclosure of Assets and Liabilities

[§_767.127\(1\)](#)

A. Ct shall require each party to disclose all assets, debts, and liabilities

- 1) May require use of standard forms

[§_767.127\(2\)](#)

- 2) Forms filed within 90 days after service of summons or filing of joint petition, as ordered by Ct

- a. Information must be updated as of date of trial

[§_767.127\(1\)](#)

B. Assets required to be disclosed

- 1) Real estate
- 2) Savings accounts

- 3) Stocks and bonds
- 4) Mortgages and notes
- 5) Life insurance
- 6) Retirement interests
- 7) Interest in partnership, LLC, or corporation
- 8) Tangible personal property
- 9) Income from employment
- 10) Future interests, vested and nonvested
- 11) Any other financial interest or source

§_767.127(1m)

- 12) If there is a child, types and costs of any health insurance policies and a copy of the health insurance policy or plan

§_767.63

- 13) Any asset valued at \$500 or more, which would be considered part of either or both parties' estate if owned at time of action, but was transferred for inadequate consideration, wasted, given away, or otherwise unaccounted for by one of the parties within one year before filing of petition or length of marriage, whichever is shorter

Stuart v Stuart

[143 Wis. 2d 347](#) (1988)

- 14) Not yet decided whether tort claim by one spouse against another, based on alleged incidents occurring during marriage, when claim not yet filed and monetary damage award possible, must be disclosed

§_767.127(1)

C. Information pertaining to debts and liabilities

Furnished on same form

D. Statement of income earned to date for current year and most recent withholding statement from employer under §_71.65(1)(a)

§_767.127(1)

E. State/federal income tax returns for last 2 years

- 1) On own initiative, Ct may require copies
- 2) On request of party, Ct shall require copies
- 3) May require copies of returns for prior years

[§_767.127\(4\)](#)

F. Failure to file disclosure allows Ct to accept other party's information as accurate

[§_767.127\(3\)](#)

G. Information is confidential

- 1) May not be available to any person for any purpose other than adjudication, appeal, modification, or enforcement of judgment affecting family of disclosing parties

Except, Clerk of Ct shall provide information to DCF for use in child support program

3. Marital Estate

[§_767.61](#)

A. Includes all property of either party, whether acquired before or during marriage, except exempted property

Leighton v Leighton
[81 Wis. 2d 620](#) (1978)
see also Topolski v
Topolski
[2011 WI 59](#)
[335 Wis. 2d 327](#)

- 1) Veteran's disability pension is income rather than property to be divided (See **Maintenance**, [FA 9](#))

Hubert v Hubert
[159 Wis. 2d 803](#)
 (Ct. App. 1990)

- 2) Accounts receivable generally considered assets subject to property division, but may be treated as anticipated income for maintenance and support purposes—not to be counted twice

Long v Long
[196 Wis. 2d 691](#)
 (Ct. App. 1995)

- 3) Money spent before final hearing is not property subject to division

“Special circumstances” may warrant deviation from rule that assets are valued as of date of final hearing

B. Marital assets include

Steinke v Steinke
[126 Wis. 2d 372](#) (1985)
Garceau v Garceau
[2000 WI App 7](#)
[232 Wis. 2d 1](#)

- 1) Value of interest in pension funds

- a. Vested and nonvested values

- b. Whether or not currently in pay status

Thorpe v Thorpe
[123 Wis. 2d 424](#)
 (Ct. App. 1985)
Pfeil v Pfeil
[115 Wis. 2d 502](#)
 (Ct. App. 1983)

- c. Determination whether federal disability and retirement benefits part of marital assets depends on specific federal statutes governing benefit at issue

Cook v Cook
[208 Wis. 2d 166](#) (1997)

- d. Military retired pay is comparable to private sector pension plan and is subject to division upon divorce

Mack v Mack
[108 Wis. 2d 604](#)
 (Ct. App. 1982)

- 2) Personal-injury settlements

Richardson v Richardson
[139 Wis. 2d 778](#) (1987)

- a. Trial Ct must consider pending personal-injury action by one party as marital asset in determining property division

- Nature of claim for personal injury renders presumption of equal division inapplicable

Krebs v Krebs

[148 Wis. 2d 51](#) (1989)

- Personal-injury settlement is divisible property, but presumption of equal division should be altered to presume injured party entitled to all amounts for pain and suffering, bodily injury, and future loss of earnings

§ 767.61(2)(a)2.

Vaccaro v Vaccaro

[67 Wis. 2d 477](#) (1975)

3) Life insurance policies

- May be divided as property
- May require children to be named as beneficiaries in child support order

See Hillman v Maretta

[133 S. Ct. 1943](#) (2013)

- May require former spouse to be named as beneficiary

Tensfeldt v Haberman

[2009 WI 77](#), ¶¶ 34–35

[319 Wis. 2d 329](#)

Cf Est of Barnes v

Hall (Est of Barnes)

[170 Wis. 2d 1](#)

(Ct. App. 1992)

- May be used in property division as estate planning tool for purpose of creating a property benefit for adult children, if parties voluntarily stipulate to such division

Haugan v Haugan

[117 Wis. 2d 200](#) (1984)

- Professional degree is “in a sense” marital asset, in that Ct should consider compensating spouse who contributed to other spouse’s education and training

Comment

Division, if any, depends on facts of case rather than presumption of equal division

Arneson v Arneson

[120 Wis. 2d 236](#)

(Ct. App. 1984)

- Income generated from a gift and property purchased from such income is marital property subject to division

Preuss v Preuss

[195 Wis. 2d 95](#)

(Ct. App. 1995)

Animal offspring are treated as income

Metz v Keener
[215 Wis. 2d 626](#)
 (Ct. App. 1997)

- 6) Retained earning fund generated after corporation was inherited is included in marital estate

Selchert v Selchert
[90 Wis. 2d 1](#)
 (Ct. App. 1979)

- 7) Account of convenience in name of party but not really money of party, not marital asset

C. Debts

Anstutz v Anstutz
[112 Wis. 2d 10](#)
 (Ct. App. 1983)

- 1) Marital estate includes debts

Unless caused by one party's squandering of parties' assets or by intentional or neglectful destruction of major assets

Anstutz v Anstutz
[112 Wis. 2d 10](#)
 (Ct. App. 1983)

- 2) Ct should assign debts, as well as divide assets, based on factors listed in §_767.61

Forester v Forester
[174 Wis. 2d 78](#)
 (Ct. App. 1993)

- 3) To exclude debts from valuation of a business, Ct must set forth adequate reasons such as the avoidance of double counting when accounts receivable excluded from assets but used as income stream for maintenance purposes

- 4) Debts incurred after commencement of action

Weiss v Weiss
[122 Wis. 2d 688](#)
 (Ct. App. 1985)

- a. Husband's debts for personal living expenses, insurance, children's college expenses may not reduce marital estate, but may bear on property division and ability to pay maintenance

Haugan v Haugan
[117 Wis. 2d 200](#) (1984)

- b. Debts incurred for husband's unilateral remodeling of house and furniture purchase after separation not part of marital estate

4. Nonmarital Estate

A. Property exempted from marital estate

[§_767.61\(2\)\(a\)1.](#)

- 1) Property acquired as a gift from a person other than the other party

[§_767.61\(2\)\(a\)2.](#)

- 2) Property acquired by reason of death of another, including but not limited to
 - a. Life insurance proceeds
 - b. Payments made under a deferred employment benefit plan defined in [§_766.01\(4\)\(a\)](#) or an individual IRA
 - c. Property acquired by right of survivorship, by a trust distribution, by a bequest or inheritance, or by a payable on death or transfer on death arrangement under [Ch 705](#)

[§_767.61\(2\)\(a\)3.](#)

- 3) Property acquired with funds acquired in a manner provided in [para. 1\)](#) or [para. 2\)](#) above

Gardner v Gardner

[190 Wis. 2d 216](#)

(Ct. App. 1994)

- 4) Property designated individual property by a Marital Property Agreement (MPA)

Van Boxtel v Van Boxtel

[2001 WI 40](#)

[242 Wis. 2d 474](#)

- a. Agreement made after commencement of divorce proceedings not MPA

Brandt v Brandt

[145 Wis. 2d 394](#)

(Ct. App. 1988)

- 5) Burden of proof initially on party seeking to establish exempt nature of asset

- a. Must prove exempt nature to reasonable degree of certainty by greater weight of credible evidence

Doerr v Doerr

[189 Wis. 2d 112](#)

(Ct. App. 1994)

- b. When a prima facie case is established, burden shifts and party opposing exemption may establish by countervailing evidence that property not gifted or inherited, or lost exempt status because character or identity not preserved

Popp v Popp
[146 Wis. 2d 778](#)
 (Ct. App. 1988)

- Character is manner in which parties choose to title or choose to treat property

Brandt v Brandt
[145 Wis. 2d 394](#)
 (Ct. App. 1988)

- Identity determined by whether inherited or gifted asset, or component of asset, can be identified and valued

B. Effect of changes to nonmarital property

1) Appreciation in value

Haldemann v Haldemann
[145 Wis. 2d 296](#)
 (Ct. App. 1988)

- a. Appreciation of value of separate property attributable to efforts of nonowning spouse may be part of marital estate under equitable distribution principles

Spindler v Spindler
[207 Wis. 2d 327](#)
 (Ct. App. 1996)

- Labor of non-owning spouse does not transmute property into marital property if value of enhancement is de minimis

Wierman v Wierman
[130 Wis. 2d 425](#) (1986)
Plachta v Plachta
[118 Wis. 2d 329](#)
 (Ct. App. 1984)

- b. Increase in value of property if increase attributable not to efforts of either spouse or marital partnership, but to source independent of marriage, remains nonmarital property
 - Example is appreciation of property caused by inflation or market conditions, or management services of donor

Torgerson v Torgerson
[128 Wis. 2d 465](#)
 (Ct. App. 1986)

- c. Increased value of real property when only down payment was from nonmarital inheritance, and mortgage payments, maintenance and improvements, and some taxes were paid from marital assets, becomes marital property

- Value of property in excess of down payment is marital asset

Fowler v Fowler

[158 Wis. 2d 508](#)

(Ct. App. 1990)

- d. Stock acquired through dividend reinvestment from inherited stock not exempt, but becomes marital property

- However, substituted or spin-off stock from inherited stock is exempt

2) Identity and character

Derr v Derr

[2005 WI App 63](#)

[280 Wis. 2d 681](#)

- a. “Identity” can be likened to “tracing” ability, and “character” can be likened to “donative intent”

Trattles v Trattles

[126 Wis. 2d 219](#)

(Ct. App. 1985)

- b. Remains nonmarital if property maintained its identity and character as a gift or inheritance

Friebel v Friebel

[181 Wis. 2d 285](#)

(Ct. App. 1993)

- c. Test is whether gifted and inherited portions of a mixed account can still be valued

- Entire account not tainted by a commingling of 5% of marital property

Fowler v Fowler

[158 Wis. 2d 508](#)

(Ct. App. 1990)

- d. Money whose character is lost by placing money in other spouse’s account or joint account becomes marital property

Gardner v Gardner

[190 Wis. 2d 216](#)

(Ct. App. 1994)

- e. Property determined individual by MPA remains so even if put in joint tenancy at request of spouse

Spindler v Spindler

[207 Wis. 2d 327](#)

(Ct. App. 1996)

- f. Non-owning spouse has burden of showing property has lost exempt status

Popp v Popp

[146 Wis. 2d 778](#)

(Ct. App. 1988)

3) Separate property or funds may be converted to marital assets

- a. Ct to determine whether property changed identity or character
- b. Use of part of separate property for marital purposes transmutes only that part of the separate property to a marital asset

Trattles v Trattles

[126 Wis. 2d 219](#)

(Ct. App. 1985)

- c. Transfer of exempt property to jointly owned property establishes rebuttable presumption of gift to marital property
 - Money gift used to buy household furnishings, to pay household expenses and maintenance, to make repairs and improvements to jointly owned home, to make mortgage payments and placed in joint bank account, is marital asset

Bonnell v Bonnell

[117 Wis. 2d 241](#) (1984)

- Real estate gift later transferred from donee to herself and husband as joint tenants is marital asset

Weiss v Weiss

[122 Wis. 2d 688](#)

(Ct. App. 1985)

- Jointly owned residence purchased with money gift is marital asset

Zirngibl v Zirngibl

[165 Wis. 2d 130](#)

(Ct. App. 1991)

- But gifted money deposited in a joint account for purpose of buying jointly titled residence not marital property when condition attached to gift not fulfilled because spouse kept residence in own name

Finley v Finley

[2002 WI App 144](#)

[256 Wis. 2d 508](#)

- No minimum time needed to jointly hold transferred property for presumption to arise—length of time property in joint account goes to whether presumption rebutted

Derr v Derr

[2005 WI App 63](#)

[280 Wis. 2d 681](#)

- Use of nondivisible real estate to secure loan did not convert mortgaged property into divisible property, although debt itself was divisible

Friebel v Friebel

[181 Wis. 2d 285](#)

(Ct. App. 1993)

- 4) Income generated and distributed by a trust when the beneficiary has no control over the trust corpus is not marital property

Arneson v Arneson

[120 Wis. 2d 236](#)

(Ct. App. 1984)

- 5) Property bought with income generated by nonmarital asset of gifted stock is marital asset when owner receives and controls the income

§_767.61

C. Nonmarital assets may be subjected to property division in case of hardship

Asbeck v Asbeck

[116 Wis. 2d 289](#)

(Ct. App. 1983)

- 1) When refusal to divide nonmarital assets would cause hardship to spouse or children of marriage
 - a. May divest party of nonmarital asset in fair and equitable manner
 - b. In making finding of hardship, Ct must
 - Explain facts and inferences relied on, and
 - Make decision reflecting considerations weighed and logical conclusion of weighing
- 2) Discretionary determination, depending on varying considerations in each case

Not limited to estate sufficient to meet essential needs

Popp v Popp

[146 Wis. 2d 778](#)

(Ct. App. 1988)

- 3) Although nonmarital property is not divisible, it may be included in a property division if nonowning spouse shows privation

Doerr v Doerr

[189 Wis. 2d 112](#)

(Ct. App. 1994)

Privation must be something more than inability to continue living at pre-divorce standard

5. Valuation of Property

A. In general

Holbrook v Holbrook

[103 Wis. 2d 327](#)

(Ct. App. 1981)

Long v Long

[196 Wis. 2d 691](#)

(Ct. App. 1995)

- 1) Value at date divorce is granted except when there are special circumstances

Franke v Franke

[2004 WI 8, ¶ 64](#)

[268 Wis. 2d 360](#)

Arbiters closing the record may or may not be a special circumstance

Dean v Dean

[87 Wis. 2d 854](#) (1979)

- 2) Parties have burden of proving value

- a. Current appraisals of fair market value, rather than purchase price, must be used

- b. Ct not required to appoint appraiser on own motion

Arneson v Arneson

[120 Wis. 2d 236](#)

(Ct. App. 1984)

- c. Party may testify as to value of own property, even if not an expert

Forester v Forester

[174 Wis. 2d 78](#)

(Ct. App. 1993)

- 3) To exclude debts from valuation of a business, Ct must set forth adequate reasons such as the avoidance of double counting when accounts receivable excluded from assets but used as income stream for maintenance purposes

4) Methods of valuation

- a. Asset-based approach—considering cost to replace, cost to reproduce, and proceeds of any liquidation
- b. Income approach—considering capitalization of earnings, capitalization of cash flow, discounted cash flow, and discounted future earnings
- c. Market approach—considering
 - Ratios or multiples derived from comparative publicly traded stock data (e.g., price-to-earnings and price-to-book)
 - Prior transfers of interests in business being valued
 - Prices derived from strategic purchases of comparative business interests
 - Comparable real estate sales

B. Valuation Principles

1) Fair market value

Liddle v Liddle

[140 Wis. 2d 132](#)

(Ct. App. 1987)

- a. Defined as “the price that property will bring when offered for sale by one who desires but is not obligated to sell and bought by one who is willing but not obligated to buy”
 - Also requires consideration of what factors buyers and sellers would find relevant when negotiating a sale

Rev. Rul. 59-60,

1959-1 CB 237

cited with approval in

Whitman v Whitman

[34 Wis. 2d 341](#) (1967)

- b. Defined as “the price at which the property would change hands between a willing buyer and a willing seller, when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts”

Arneson v Arneson

[120 Wis. 2d 236](#)

(Ct. App. 1996)

- c. Owner can testify re: value of own property

2) Conflicting valuations

Schorer v Schorer

[177 Wis. 2d 387](#)

(Ct. App. 1993)

- a. Ct not required to accept one method as more accurate than another but must give reasons for relying upon one method over another

Dean v Dean

[87 Wis. 2d 854](#) (1979)

Peerenboom v

Peerenboom

[147 Wis. 2d 547](#)

(Ct. App. 1988)

- b. Ct may conclude that value lies somewhere between the values expressed by experts, but the Ct must support its decision with facts of record

Wahl v Wahl

[39 Wis. 2d 510](#) (1968)

- c. Method may vary depending upon type of business being valued; earnings more important in sales and service businesses while assets more important in investment or holding companies

3) Goodwill

McReath v McReath

[2011 WI 66,](#)

[335 Wis. 2d 643](#)

- a. Ct shall include the value of salable professional goodwill attendant to business interest
- b. In estate including professional goodwill, Ct need not draw distinction between personal and enterprise goodwill
- c. *McReath* did not overrule holding in *Holbrook v Holbrook*, [103 Wis. 2d 327](#) (Ct. App. 1981), that marital estate excludes goodwill that cannot be exchanged or sold on open market because of personal ethical or contractual considerations
- d. See *infra* [FA 9, Sec. 2.B.6](#) for discussion of the impact of goodwill on maintenance determinations

C. Real estate and tangible personal property

Corliss v Corliss

[107 Wis. 2d 338](#)

(Ct. App. 1982)

- 1) Value at fair and current market value
 - a. Price property will bring in negotiated sale between owner willing but not obligated to sell and buyer willing but not obligated to buy
- 2) If parties stipulate or testify as to equity in building encumbered by mortgage, use equity value

Leathem Smith Lodge

Inc v St

[94 Wis. 2d 406](#) (1980)

- 3) Comparable sales method is preferable method of valuation, when available

Schwegler v Schwegler

[142 Wis. 2d 362](#)

(Ct. App. 1987)

- 4) Ct may disregard real estate broker's appraisal and rely on real estate tax assessment when assessment contradicts appraisal evidence

D. Closely held, family corporations

Wahl v Wahl

[39 Wis. 2d 510](#) (1968)

- 1) Fair market value

Dean v Dean

[87 Wis. 2d 854](#) (1979)

- 2) Not required to accept one method of stock valuation as more accurate than another

Arneson v Arneson

[120 Wis. 2d 236](#)

(Ct. App. 1984)

- 3) Subject to expert evaluation, taking into account
 - a. Nature of business and history of the enterprise since its inception
 - b. Fixed and liquid assets at actual or book value

- c. Past earnings or loss and future earning potential
- d. Business's net worth
- e. Marketability of shares, including whether ownership is majority or minority interest
- f. Economic outlook in general and condition and outlook of the specific industry in particular
- g. The dividend or distribution paying capacity of the business

Rev. Rul. 59-60,
1959-1 CB 237

Schorer v Schorer
[177 Wis. 2d 387](#)
(Ct. App. 1993)

- 4) When there are conflicting views between experts, Ct not required to accept any one method of evaluation over another, but Ct must give reasons for relying upon one method over another

Schorer v Schorer
[177 Wis. 2d 387](#)
(Ct. App. 1993)

5) Special considerations

Arneson v Arneson
[120 Wis. 2d 236](#)
(Ct. App. 1984)

- a. Minority discounts and control premiums can be used in valuing closely held business

Dean v Dean
[87 Wis. 2d 854](#) (1979)

Schorer v Schorer
[177 Wis. 2d 387](#)
(Ct. App. 1993)

- b. Discount to account for reduced marketability of business's stock caused by difficulties in finding buyers for closed corporations may be appropriate

Ondrasek v Ondrasek
[126 Wis. 2d 469](#)
(Ct. App. 1985)

Weiss v Weiss
[122 Wis. 2d 688](#)
(Ct. App. 1985)

- c. Agreements affecting transferability of business interests, such as partnership and buy-sell agreements, may be evidence of value but not a controlling consideration

Liddle v. Liddle
[140 Wis. 2d 132](#)
(Ct. App. 1987)

- d. Reduction to reflect income taxes arising from sale of the interest depends upon the level of probability that the business interest will be sold

Holbrook v Holbrook

[103 Wis. 2d 327](#)

(Ct. App. 1981)

- e. See Goodwill at [Sec. B.3](#)) above

- f. Other factors affecting valuation include

- A controlling business owner's intention to remain an independent business or to sell to a strategic buyer
- A noncompetition agreement that might be a claim on the equity of a business

Chen v Chen

[142 Wis. 2d 7](#)

(Ct. App. 1987)

E. Stock options

- 1) Accrued and nonaccrued stock options are assets included in marital estate and considered in determining property division
- 2) Nonvested, unassignable nature of stock options is only a factor to be considered in valuation and does not bring them outside marital estate

Maritato v Maritato

[2004 WI App 138](#)

[275 Wis. 2d 252](#)

- 3) Whether to divide stock options as part of marital estate is discretionary matter for Ct

Good primer on types and treatment of stock options

F. Partnerships, professional service corporations

Ondrasek v Ondrasek

[126 Wis. 2d 469](#)

(Ct. App. 1985)

- 1) Value: Monetary consequences of partner withdrawing, or value of partner's interest at dissolution
 - a. Value assets, liabilities, and capital accounts
 - b. Include accounts receivable

- In limited instances, may be considered part of income rather than property

c. Include real estate

- If divorce requires sale of real estate, consider tax consequences

Weiss v Weiss

[122 Wis. 2d 688](#)

(Ct. App. 1985)

d. Buyout agreement is evidence of value

- 2) For the value of goodwill, when determining the value of a partnership's assets, see [Sec. 5.B.3](#)) above

G. Retirement and pension plans

Rodak v Rodak

[150 Wis. 2d 624](#)

(Ct. App. 1989)

1) Pensions are divisible property

a. Portion of pension earned before parties married is divisible property on divorce

b. Premarital component of plan is factor relevant to how asset divided, not whether divided

Herd v Herdt

[152 Wis. 2d 17](#)

(Ct. App. 1989)

c. While pension funds must be considered part of marital estate, Trial Ct retains discretion to make unequal property division giving one spouse no share of benefits currently in pay status for good reason

Dutchin v Dutchin

[2004 WI App 94](#)

[273 Wis. 2d 495](#)

- In limited instances, may be treated as stream of income

Dewey v Dewey

[188 Wis. 2d 271](#)

(Ct. App. 1994)

Cf. Johnson v Masters

[2013 WI 43](#), ¶ 15 n.10

[347 Wis. 2d 238](#)

d. Division creates two separate property interests that become vested when decree entered

Bloomer v Bloomer

[84 Wis. 2d 124](#) (1978)

2) Three suggested methods of valuation

- a. Determine contributions to fund plus interest—award spouse appropriate share
- b. Actuarial Value—calculate present value of benefits when they vest

Leighton v Leighton
[81 Wis. 2d 620](#) (1978)

- Discount for interest in future, mortality, likelihood of vesting
- Consider life expectancy as retiree

Peterson v Peterson
[126 Wis. 2d 264](#)
 (Ct. App. 1985)

- In some cases, unlikely receipt of benefits in future may justify determination that plan has no value

- c. Award fixed percentage of future payments to spouse, payable as, if, and when paid to plan beneficiary

Bloomer v Bloomer
[84 Wis. 2d 124](#) (1978)

- 3) Ct has discretion in choosing appropriate valuation method

- a. Appropriate exercise of discretion depends on

- Circumstances of case
- Status of parties
- Whether result is reasonable valuation of the marital asset

Washington v Washington
[2000 WI 47](#)
[234 Wis. 2d 689](#)

- 4) When there is to be a delay in lump-sum payment, judgment should address appreciation and interest

Schwab v Schwab
[2021 WI 67](#)
[397 Wis. 2d 820](#)

- 5) Statute of repose, under [§ 893.40](#), does not defeat enforcement of a judgment provision with a “when and if” clause
- 6) See [Sec. 8.F.](#) below and [QDROS](#), [FA 11](#), for distribution of retirement plans

H. Professional degree

Haugan v Haugan
[117 Wis. 2d 200](#) (1984)

- 1) Difficult to evaluate worth, use theory that best achieves fairness and justice

Lundberg v Lundberg
[107 Wis. 2d 1](#) (1982)

- 2) Valuation theories include

Roberto v Brown
[107 Wis. 2d 17](#) (1982)

- a. Supporting spouse's financial and homemaking services contributed, plus inflation
- b. Income student spouse sacrificed for school attendance
- c. Present value of student spouse's enhanced earning capacity
- d. Half of enhanced value of student spouse's yearly salary for years student spouse attended school

I. Other assets and liabilities

Forester v Forester
[174 Wis. 2d 78](#)
 (Ct. App. 1993)

- 1) Tax refunds may be treated as asset when prior year's refund that was joint marital property used by one spouse to pay debt (income tax) for which she or he alone was responsible

Steiner v Steiner
[2004 WI App 169](#)
[276 Wis. 2d 290](#)

- 2) Nontransferable sick leave account with no fair market value not a divisible asset, BUT can be considered as "other economic circumstance"

J. Tax consequences

Wright v Wright
[92 Wis. 2d 246](#) (1979)

- 1) Ct must consider tax consequences of rulings and any proposed division; failure to do so may be erroneous exercise of discretion

Ashraf v Ashraf
[134 Wis. 2d 336](#)
 (Ct. App. 1986)

- a. When one party would be required to liquidate certain real estate to accomplish Ct-ordered division, Ct must consider tax impact but is not required to minimize tax consequences to either party

Liddle v Liddle
[140 Wis. 2d 132](#)
 (Ct. App. 1987)

b. Ct may reduce value of limited partnership for future capital gains taxes to be incurred upon sale of the assets

- When expert testifies to value of anticipated sale of assets, and
- Sale of asset likely

Ondrasek v Ondrasek

[126 Wis. 2d 469](#)

(Ct. App. 1985)

c. Ct cannot discount value of property by capital gains tax if sale of property

- Hypothetical or theoretical

Preuss v Preuss

[195 Wis. 2d 95](#)

(Ct. App. 1995)

- Neither probable nor imminent

Liddle v Liddle

[140 Wis. 2d 132](#)

(Ct. App. 1987)

— Speculative nature of valuation is inherent in assigning values to future interest

Corliss v Corliss

[107 Wis. 2d 338](#)

(Ct. App. 1982)

2) Failure to consider tax consequences may be erroneous exercise of discretion

Brandt v Brandt

[145 Wis. 2d 394](#)

(Ct. App. 1988)

- a. When parties fail to present evidence or reliable data of tax consequences of proposed property division, Ct's failure to address such consequences does not render judgment unconscionable

Fowler v Fowler

[158 Wis. 2d 508](#)

(Ct. App. 1990)

- b. Since Ct's responsibility is to decide on basis of evidence, if parties present no evidence of tax consequences, Ct does not erroneously exercise its discretion in failing to take those consequences into consideration

Rumpff v Rumpff

[2004 WI App 197](#)

[276 Wis. 2d 606](#)

- But when no expert testimony presented, Ct may rely on own knowledge and experience to engage in reasonable speculation about anticipated tax impact on present value of retirement assets

- 3) See **Tax Checklist**, [FA 7](#), for details

6. Division of Marital Assets

§_767.61

A. Ct shall presume marital property to be divided equally

Bonnell v Bonnell

[117 Wis. 2d 241](#) (1984)

Division of property upon divorce is within sound discretion of Circuit Ct and will not be disturbed unless an erroneous use of discretion

§_767.61(3)

LeMere v LeMere

[2003 WI 67](#)

[262 Wis. 2d 426](#)

B. Any deviation from presumptive equal property division must be based on consideration of *all* of the following factors

§_767.61(3)(a)

- 1) Length of marriage

§_767.61(3)(b)

- 2) Property brought to marriage by each party

Thorpe v Thorpe

[123 Wis. 2d 424](#)

(Ct. App. 1985)

- a. Premarital property is part of marital estate; pre-marriage origin may be reason for non-equal division

Schwartz v Linders

[145 Wis. 2d 258](#)

(Ct. App. 1988)

- b. Ct may consider prior inherited status of divisible property

§_767.61(3)(c)

- 3) Whether one party has substantial assets not subject to division by Ct

§_767.61(2)

Grumbeck v Grumbeck

[2006 WI App 215](#)

[269 Wis. 2d 611](#)

Ct cannot circumvent “hardship” requirement for invading nonmarital property and order a “de facto” 50/50 split of all parties’ property based on mere length of marriage and parties’ contribution to marriage

§_767.61(3)(d)

- 4) Contribution of each party to marriage, including economic value of homemaking and child-care services

Jasper v Jasper

[107 Wis. 2d 59](#) (1982)

- a. Marriage is partnership, both parties contribute by respective abilities; full-time homemaker’s contribution at least as great as that of working spouse

Anstutz v Anstutz

[112 Wis. 2d 10](#)

(Ct. App. 1983)

- b. Parties' efforts to preserve marital assets may be considered under [§ 767.61\(3\)\(d\)](#)

Parrett v Parrett

[146 Wis. 2d 830](#)

(Ct. App. 1988)

- c. Ct may alter equal division when one party makes a product, and develops a business that accounts for large percentage of marital estate

[§ 767.61\(3\)\(e\)](#)

- 5) Age and physical and emotional health of parties

[§ 767.61\(3\)\(f\)](#)

- 6) Contribution of one party to education, training, or increased earning power of other

Haugan v Haugan

[117 Wis. 2d 200](#) (1984)

If property insufficient for fair compensation, may use maintenance to compensate contributing spouse

[§ 767.61\(3\)\(g\)](#)

- 7) Earning capacity of each party, including

- a. Education, training, and employment skills

- b. Work experience and length of absence from job market

- c. Custodial responsibilities for children

- d. Time, expense necessary to acquire sufficient education/training to enable party to become self-supporting at living standard comparable to that during marriage

[§ 767.61\(3\)\(h\)](#)

Holbrook v Holbrook

[103 Wis. 2d 327](#)

(Ct. App. 1981)

- 8) Desirability of awarding family home, or right to live in family home, to custodial parent for reasonable time

[§ 767.61\(3\)\(i\)](#)

- 9) Amount and duration of maintenance

[§ 767.61\(3\)\(j\)](#)

- 10) Other economic interests of parties, including vested and unvested pension benefits, and future interests

[§ 767.61\(3\)\(k\)](#)

- 11) Tax consequences

Wright v Wright

[92 Wis. 2d 246](#) (1979)

- a. Failure to consider may constitute erroneous exercise of discretion

b. See **Tax Checklist**, [FA 7](#)

§ 767.61(3)(L)

12) Written premarital or marital agreements about property division binding on Ct unless terms of agreement inequitable to either party

a. Agreement presumed to be equitable

Button v Button[131 Wis. 2d 84](#) (1986)

b. Agreement inequitable unless each spouse made fair and reasonable disclosure to other of financial status at time agreement executed

*Schumacher v**Schumacher*[131 Wis. 2d 332](#) (1986)

- In absence of fair and reasonable disclosure, independent knowledge of one another's financial status may substitute, but independent knowledge not general or imputed knowledge of other's assets or their value
- De minimis failures to disclose do not invalidate agreement
- When wife did not have list or documentation of husband's assets, did not know how much was in his bank accounts, and did not know of his pension plan, no fair and reasonable disclosure

Button v Button[131 Wis. 2d 84](#) (1986)

c. Agreement is inequitable unless each spouse entered into agreement fairly and voluntarily

- Factors to consider include whether each party was represented by independent counsel, had adequate time to review agreement, understood terms and effect of agreement, and understood financial rights in absence of agreement

Button v Button[131 Wis. 2d 84](#) (1986)

d. Agreement is inequitable unless substantive provisions upon divorce fair to each spouse

- Assessment of fairness to be made as to time agreement was executed and, if circumstances significantly changed since agreement, then also at time of divorce
- To be fair, need not divide property as Ct would, but should in manner appropriate to circumstances of parties, take into account that each spouse contributes to prosperity of marriage

Levy v Levy[130 Wis. 2d 523](#) (1986)

e. Agreements contemplating property distribution only at death of one party not to be considered

Brandt v Brandt[145 Wis. 2d 394](#)

(Ct. App. 1988)

- f. Enforcement of marital agreement largely ignored during long-term marriage would be substantively unfair under *Button*

Gardner v Gardner

[175 Wis. 2d 420](#)

(Ct. App. 1993)

- g. Misrepresentation underlying agreement that causes marital property to be depleted for benefit of misrepresenter is highly relevant

§_767.61(3)(m)

13) Other factors Ct deems relevant in individual case

Fuerst v Fuerst

[93 Wis. 2d 121](#)

(Ct. App. 1979)

- a. Support of stepchildren may be considered unless stepparent assumed relationship “in loco parentis” to children

Schwegler v Schwegler

[142 Wis. 2d 362](#)

(Ct. App. 1987)

- b. Ct not required to consider stepparent’s support of minor stepchildren in determining whether 50/50 property division appropriate

Anstutz v Anstutz

[112 Wis. 2d 10](#) (1983)

14) Misconduct not a factor

Unless it involves depletion of marital assets

C. Property division by stipulation

1) Judge-approved stipulated initial orders before judgment under §_767.333(5)

§_767.333(5)

- a. Judge may enter partial final order based on stipulation regarding property division before judgment
- b. Before entering stipulation, Judge must comply with any requirements under §_767.61 and hold a hearing on the record
- c. Party seeking relief from stipulation under §_767.333(5) regarding property division must comply with §_806.07
- d. [Sec.](#) 767.333 requires stipulations under that statute to be approved by a Judge likely because the case remains contested until all issues are resolved; therefore, partial stipulations under §_767.333 are not available for approval by a CCC pursuant to §_757.69(1)(p)1.

2) Ct-approved stipulations under §_767.34

§_767.34

a. Ct may approve parties' stipulation for division of property, if

Conrad v Conrad

[92 Wis. 2d 407](#) (1979)

Miner v Miner

[10 Wis. 2d 438](#) (1960)

- Ct examines parties and determines

— They understand stipulation

— They voluntarily entered into the stipulation

- Ct carefully examines stipulation against background of full information on parties' economic status and resources

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

b. Stipulations are recommendation of parties, not binding on Ct

- When Ct adopts stipulation, makes it part of judgment and does so on own responsibility
- Ct may modify stipulation, but should give parties opportunity to accept modification, or repudiate modified stipulation and try case as contested proceeding

Norman v Norman

[117 Wis. 2d 80](#)

(Ct. App. 1983)

c. If either party repudiates stipulation before trial, must handle case as contested proceeding

[§_767.34\(2\)\(b\)](#)

d. Ct may not approve stipulation that assigns substantially all of property to one party if other party applying for Medical Assistance or Ct determines it can be reasonably anticipated that other party will apply for Medical Assistance within 30 months after stipulation

D. Installment payments in contested cases

Overson v Overson

[140 Wis. 2d 752](#)

(Ct. App. 1987)

1) Allowance of interest on balance due in property division payable in installments within discretion of Trial Ct

Overson v Overson

[125 Wis. 2d 13](#)

(Ct. App. 1985)

2) If property division accomplished by installment payments, Ct must compensate recipient spouse for money award would earn during installment period

a. Award interest, or

- b. Consider present value of property division payable in future, or
- c. Explain failure to do so

Parrett v Parrett

[146 Wis. 2d 830](#)

(Ct. App. 1988)

- 3) When property division installments based on future ability of spouse to continue generating income that other spouse would share as received, neither party enjoys whole present value of property and no interest need be awarded

Jasper v Jasper

[107 Wis. 2d 59](#) (1982)

Wright v Wright

[92 Wis. 2d 246](#) (1979)

- 4) Consider tax implications

[§_767.61\(4\)](#)

E. Set aside for children

- 1) To protect and promote best interests of parties' minor children, Ct may set aside part of property in separate fund or trust for their support, maintenance, education, and general welfare

[§_767.57\(5\)](#)

- a. May appoint trustee or receiver to receive payments, invest, and pay over income
- b. Trustee or receiver may give surety bond

7. Depletion, Waste, or Fraudulent Transfer of Marital Assets

[§_767.225\(1\)\(h\)](#)

A. Ct may make temporary order prohibiting either party from disposing of assets within jurisdiction of Ct

[§_767.63](#)

B. Any asset with fair market value of \$500 or more owned by either or both parties, is rebuttably presumed to be part of estate for property division, if

- 1) Asset was transferred for inadequate consideration, wasted, given away, or otherwise unaccounted for by one party, and
- 2) Occurred within one year before filing of petition or length of marriage, whichever is shorter

Derr v Derr

[2005 WI App 63](#)

[280 Wis. 2d 681](#)

If greater than one year, no presumption. Burden is on party seeking to include asset in estate

Dean v Dean

[87 Wis. 2d 854](#) (1979)

- 3) When asset held in name of third party, burden of proof on person seeking inclusion of asset in marital estate

§_767.61(3)

C. Waste: Dissipated or Mismanaged Marital Assets

Covelli v Covelli

[2006 WI App 121](#)

[293 Wis. 2d 707](#)

Anstutz v Anstutz

[112 Wis. 2d 10](#)

(Ct. App. 1983)

- 1) Ct can require a party to pay debts caused by: squandering of marital assets; intentional or neglectful destruction of property; or failure to pay taxes

Anstutz v Anstutz

[112 Wis. 2d 10](#)

(Ct. App. 1983)

- 2) Ct can offset party's contributions to marriage by that party's excessive gambling or drinking

Noble v Noble

[2005 WI App 227](#)

[287 Wis. 2d 699](#)

- 3) May not be waste for failure to take advantage of opportunity to acquire property that would increase value of marital estate

- 4) Situations not found to be waste:

Dean v Dean

[87 Wis. 2d 854](#) (1979)

- a. Repayment of bona fide debts

- b. Payment for vacations, if reasonable

Van Wyk v Van Wyk

[86 Wis. 2d 100](#) (1978)

- c. Monetary wedding gift to daughter in similar amount parties had previously given to son on his marriage

Zabel v Zabel

[210 Wis. 2d 336](#)

(Ct. App. 1997)

D. Joinder of third party proper to resolve equitable claim relating to marital property fraudulently conveyed

Derr v Derr

[2005 WI App 63](#)

[280 Wis. 2d 681](#)

E. Uncooperative party cannot be heard to complain of Ct's inclusion of asset in marital estate when that party had relevant information in that party's control but refused to provide it

8. Findings, Conclusions, Judgment, and Order

Lacey v Lacey

[45 Wis. 2d 378](#) (1970)

A. Findings and conclusions

1) Ct must make and state complete, comprehensive findings, as to

a. What constitutes marital property subject to division

b. Valuation facts and considerations

Kastelic v Kastelic

[119 Wis. 2d 280](#)

(Ct. App. 1984)

2) Ct conclusions must

a. Reflect reasoning process dependent on facts and inferences in record

b. Be based on proper legal standard

c. Have basis set forth on record

[§_767.251](#)

B. Findings of fact, conclusions of law, and written judgment drafted by petitioner, unless Ct otherwise directs

1) Submitted to Ct and filed with clerk within 30 days after judgment granted

2) Draft findings, conclusions, and judgment must be approved by all counsel, including GAL, Cty child support agency Atty, and any other person designated by Ct or local rule for approval, then submitted to Ct

Comment

a. If approvals not forthcoming, Ct can either set hearing or enter appropriate findings, conclusions, and judgment on own motion

3) Final stipulations may be appended to judgment and incorporated by reference

[§_767.61\(5\)\(a\)](#)

C. Divest and transfer title as required by property division

[§_767.61\(6\)](#)

1) If real estate title affected, certified copy of that portion of judgment shall be recorded with appropriate register of deeds

Wozniak v Wozniak

[121 Wis. 2d 330](#) (1984)

2) May subject property awarded to one spouse, to lien of other spouse

Judgment should specify type of lien (mortgage or judgment) awarded

Lutzke v Lutzke

[122 Wis. 2d 24](#) (1985)

D. Jointly held property

- 1) Ct should explicitly adjudicate postdivorce status of jointly held property
- 2) If order divestiture, judgment in form recordable in register of deeds' office, and ordered recorded

Trowbridge v Trowbridge

[16 Wis. 2d 176](#) (1962)

E. Out-of-State property

- 1) Cannot change title to real estate outside Wis, but can compel party to execute conveyance of real estate

F. Retirement plans

- 1) May be divided by
 - a. Qualified Domestic Relations Order (QDRO)
 - b. Domestic Relations Order (DRO)

2) QDRO division

29 [USC](#) 1001–1461

- a. Under the federal Employee Retirement Income Security Act (ERISA), federal Retirement Equity Act (REA), and federal Internal Revenue Code, some retirement plans may not be divided at divorce except under QDRO

- See **QDROs**, [FA 11](#), for list of plans and model QDRO

1989 Wis Act 218

See Johnson v Masters

[2013 WI 43](#)

[347 Wis. 2d 238](#)

- Wis Retirement System Plans (*see* [Ch 40](#)) now divisible by QDRO

Taylor v Taylor

[2002 WI App 253](#)

[258 Wis. 2d 290](#)

- 3) Fluctuation of value: if each party is granted percentage of plan, as opposed to fixed sum, parties share market gain/loss until distribution made to non-employee spouse under QDRO
- 4) Upon death

Mausing v Mausing

[146 Wis. 2d 92](#) (1988)

- a. Ct may order that non-employee spouse's share of pension benefit payments continue to be paid after employee spouse's death

- b. Ct may order that non-employee spouse's estate or named beneficiary receive non-employee spouse's share of pension benefits after non-employee spouse's death

Lindsey v Lindsey

[140 Wis. 2d 684](#)

(Ct. App. 1987)

5) City employees retirement plan subject to spendthrift provision not subject to a DRO

- a. Ct has discretion to order employee spouse to make specific payout election based on circumstances of parties at that time
- b. Ct should retain jurisdiction to review situation and make other order if employee spouse elects a payout adverse to interests of non-employee spouse

G. Military pensions

10 [USC](#) 1408(c)(1)

1) Military pensions ("disposable retired pay") divisible at divorce in accordance with law of the state

10 [USC](#) 1408(a)(4)(A)(ii)

Howell v Howell

[137 S. Ct. 1400](#) (2017)

NOTE: Federal statute exempts from division any portion of pension that veteran waives in order to receive service-related disability benefits.

Kildea v Kildea

[143 Wis. 2d 108](#)

(Ct. App. 1988)

2) Wis Ct has jurisdiction to divide military pension of party not residing or domiciled in Wis

- a. When that party admits service on petition for divorce and
- b. When that party submits to personal jurisdiction of Wis Ct by a general appearance

Artis-Wergin v

Artis-Wergin

[151 Wis. 2d 445](#)

(Ct. App. 1989)

- Nonresident, nondomiciled party submits to jurisdiction if first communication to Ct does not reserve jurisdictional objection

9. Continuing Jurisdiction on Death of Party

Roeder v Roeder

[103 Wis. 2d 411](#)

(Ct. App. 1981)

A. After oral divorce judgment, family Ct retains jurisdiction to take evidence on property division and make final judgment, despite death of party

1) Jurisdiction concurrent with probate Ct

Roeder v Roeder

[103 Wis. 2d 411](#)

(Ct. App. 1981)

- a. NOTE: Ct of Appeals specifically disapproves of granting divorce judgment before all evidence in case is introduced, therefore

- b. Ct should withhold judgment until evidence is complete

Pettygrove v Pettygrove

[132 Wis. 2d 456](#)

(Ct. App. 1986)

- 2) If party dies during divorce hearing but before granting of divorce judgment, action abates and Ct is without jurisdiction

Morissette v Morissette

[99 Wis. 2d 467](#)

(Ct. App. 1980)

B. After divorce judgment, family Ct has concurrent jurisdiction with probate Ct over Ct-ordered division of property

Determine more appropriate forum

10. Modification and Relief from Judgment

Thorpe v Thorpe

[123 Wis. 2d 424](#)

(Ct. App. 1985)

A. Final property division cannot be modified pursuant to [§ 767.59\(1c\)](#)

Washington v

Washington

[2000 WI 47](#)

[234 Wis. 2d 689](#)

- 1) Statute not bar to postjudgment construction or clarification of ambiguous property division

Hutjens v Hutjens

[2002 WI App 162](#)

[256 Wis. 2d 255](#)

Mere silence regarding interest does not automatically render judgment ambiguous

Spankowski v

Spankowski

[172 Wis. 2d 285](#)

(Ct. App. 1992)

- 2) May not modify final property division to recreate debt discharged in bankruptcy

B. Discretion to grant relief from judgment under [§ 806.07](#)

Franke v Franke

[2004 WI 8](#)

[268 Wis. 2d 360](#)

Conrad v Conrad

[92 Wis. 2d 407](#) (1979)

- 1) Includes judgments based on stipulations or confirmed arbitration awards

St ex rel MLB v DGH

[122 Wis. 2d 536](#) (1985)

- 2) Claim under [§_806.07\(1\)\(h\)](#) (any other reasons justifying relief) requires use of extraordinary circumstances test

Winkler v Winkler

[2005 WI App 100](#)

[282 Wis. 2d 746](#)

No erroneous exercise of discretion in finding that pension enhancement received eight years after divorce did not meet extraordinary circumstances test

C. Fraud on Ct

[§_767.127\(5\)](#)

- 1) If party deliberately or negligently fails to disclose all assets as required by [§_767.127\(1\)](#) and, as a result, asset(s) with fair market value of \$500 or more omitted from final distribution of property
 - a. Party aggrieved by nondisclosure may petition Ct that granted judgment for creation of constructive trust
 - Petition may be filed at any time
 - b. On finding of failure to disclose, Ct shall create constructive trust of all nondisclosed assets for benefit of parties and minor or dependent children
 - Party in whose name assets are held is constructive trustee
 - Other terms and conditions as Ct may determine

[§_806.07](#)

- 2) Other actions for fraud governed by Rules of Civil Procedure

One-year statute of limitation for such actions

FA 9: MAINTENANCE

1. Purposes

LaRocque v LaRocque
[139 Wis. 2d 23](#) (1987)

A. Two distinct but related objectives: Support and Fairness

- 1) Support objective—to support recipient spouse in accordance with parties' needs and earning capacities
- 2) Fairness objective—to ensure fair and equitable financial arrangement between parties in each individual case

Rohde-Giovanni v Baumgart
[2004 WI 27](#)
[269 Wis. 2d 598](#)

Applies to prejudgment and postjudgment actions, whether obtained by stipulation or contest

Lundberg v Lundberg
[107 Wis. 2d 1](#) (1982)

B. Flexibility

- 1) Not based solely on need or limited to situations within which one spouse is incapable of self-support
- 2) May be awarded for rehabilitation of spouse who has been out of job market
- 3) May be awarded to compensate spouse for contribution to other spouse's increased earning power when property division cannot achieve equity

§ 767.385

C. May be granted even when divorce or separation is denied

2. Determination of Amount of Maintenance

A. Prenuptial and Postnuptial Marital Property Agreements may apply. See [FA 8, Property Division, Sec. 1](#)

Woodard v Woodard
[2005 WI App 65](#)
[281 Wis. 2d 217](#)

B. Financial resources available at time maintenance determination made

LaRocque v LaRocque
[139 Wis. 2d 23](#) (1987)

- 1) All income, not limited to salary
 - a. Includes cash equivalents and benefits, e.g., expense accounts

Schinner v Schinner
[143 Wis. 2d 81](#)
 (Ct. App. 1988)

- b. When evidence that bonuses awarded in past, they should be considered part of payer's income stream available for support and maintenance

Hefty v Hefty

[172 Wis. 2d 124](#) (1992)

Johnson v Johnson

[225 Wis. 2d 513](#)

(Ct. App. 1999)

- c. May take into account postdivorce increases that the payer could reasonably anticipate

Poindexter v Poindexter

[142 Wis. 2d 517](#) (1988)

- d. May be awarded as percentage of payer's monthly income

Woodard v Woodard

[2005 WI App 65](#)

[281 Wis. 2d 217](#)

- e. Financial benefit from cohabitation an appropriate consideration

Kastelic v Kastelic

[119 Wis. 2d 280](#)

(Ct. App. 1984)

Pelot v Pelot

[116 Wis. 2d 339](#)

(Ct. App. 1983)

2) Pension funds, if not included in property division

Pelot v Pelot

[116 Wis. 2d 339](#)

(Ct. App. 1983)

3) Interest on money-market investment

Weberg v Weberg

[158 Wis. 2d 540](#)

(Ct. App. 1990)

4) Disability payments and personal-injury awards

Topolski v Topolski

[2011 WI 59](#), ¶ 46

[335 Wis. 2d 327](#)

Disability payments, such as Social Security disability payments or veteran's disability payments, replace wages lost by the individual because of the disability and are generally classified as income at divorce; as such, these payments are not assets divisible at dissolution of the marriage, but are considered income for the purpose of determining a maintenance award

Johnson v Johnson

[78 Wis. 2d 137](#) (1977)

Forester v Forester

[174 Wis. 2d 78](#)

(Ct. App. 1993)

5) Accounts receivable and debts of partnership or business, if not considered asset for property division

McReath v McReath

[2011 WI 66](#)

[335 Wis. 2d 643](#)

- 6) Property division payments by a professional for goodwill are not double counting, and not an offset in the professional's income available to pay maintenance or a credit against the professional's maintenance obligation

C. Need of recipient

Poindexter v Poindexter

[142 Wis. 2d 517](#) (1988)

- 1) Ct must evaluate need in context of permitting former spouse to live at standard of living comparable to that enjoyed during the marriage

§_767.56(1c)(c)

LaRocque v LaRocque

[139 Wis. 2d 23](#) (1987)

- 2) While Ct should consider property division in awarding maintenance, it should not require one recipient to liquidate that division for living expenses while the other need not

DeLaMatter v

DeLaMatter

[151 Wis. 2d 576](#)

(Ct. App. 1989)

- 3) Refusal by an alcoholic spouse to obtain medically recommended treatment is relevant factor in maintenance determination if that spouse claims maintenance needed because of the alcoholism

D. Impact on payer's employment incentive

Bahr v Bahr

[107 Wis. 2d 72](#) (1982)

Schmitt v Schmitt

[2001 WI App 78](#)

[242 Wis. 2d 565](#)

As part of fairness objective, consider impact of award on payer's incentive to be productive and advance in the job market

§_767.56

E. Statutory factors Ct must consider, when relevant

§_767.56(1c)(a)

- 1) Length of marriage

Bahr v Bahr

[107 Wis. 2d 72](#) (1982)

- a. In long-term marriages, Ct may use 50% of total earnings as starting point

Wolski v Wolski

[210 Wis. 2d 183](#)

(Ct. App. 1997)

- b. If parties married to each other more than once, Ct may consider total years of marriages

§_767.56(1c)(b)

- 2) Age and physical and emotional health of parties

§_767.56(1c)(c)

- 3) Division of property

§_767.56(1c)(d)

- 4) Educational level of each party

At time of marriage, and at time action commenced

§_767.56(1c)(e)

5) Earning capacity of party seeking maintenance

- a. Educational background, training, and employment skills
- b. Work experience and length of absence from job market

Hartung v Hartung

[102 Wis. 2d 58](#) (1981)

- c. Custodial responsibilities for children

- d. Time and expense necessary to acquire sufficient training and education to enable party to find appropriate employment

Fowler v Fowler

[158 Wis. 2d 508](#) (1990)

- e. Career choices

§_767.56(1c)(f)

Bahr v Bahr

[107 Wis. 2d 72](#) (1982)

6) Feasibility that party seeking maintenance can become self-supporting at standard of living reasonably comparable to standard enjoyed during marriage

Hartung v Hartung

[102 Wis. 2d 58](#) (1981)

- a. If feasible, time necessary to achieve that goal, based on evidence in record

VanderPerren v

VanderPerren

[105 Wis. 2d 219](#) (1982)

Fowler v Fowler

[158 Wis. 2d 508](#) (1990)

- b. Dependent spouse's initiative and efforts to become self-supporting are relevant factors, but not determinative

§_767.56(1c)(g)

7) Tax consequences (see **Tax Checklist**, [FA 7](#))

Bisone v Bisone

[165 Wis. 2d 114](#)

(Ct. App. 1991)

- a. Use of tax calculations generated by computer programs permitted if
 - Inputted data is in accord with the law
 - Inputted factual findings are not clearly erroneous
 - Parties have sufficient opportunity to challenge

Poindexter v Poindexter

[142 Wis. 2d 517](#) (1988)

- b. Percentage maintenance award does not preclude consideration of tax consequences
- c. Payments may continue after remarriage
- d. May be paid to third party on behalf of payee if made pursuant to terms of divorce or separation agreement or order, or at written request of payee
 - Examples: Rent, mortgage, taxes, medical insurance, tuition
 - Premiums for term or whole life insurance on payer's life, to extent that payee spouse is owner of policy
- e. Payments to maintain property owned by payer and used by payee are not considered maintenance

[§_767.56\(1c\)\(h\)](#)

8) Mutual agreements made before or during marriage

- a. In which one party has made financial or service contributions to other with expectation of reciprocation or compensation in future, or
- b. Concerning any arrangement for financial support

Heppner v Heppner

[2009 WI App 90](#)

[319 Wis. 2d 237](#)

NOTE: Agreements concerning future job or retirement plans are not enforceable because such agreements were made based on the assumption that the parties were going to remain together.

[§_767.56\(1c\)\(i\)](#)

Haugan v Haugan

[117 Wis. 2d 200](#) (1984)

9) Contribution of one party to education, training, or increased earning power of other

- a. Contributing spouse may be recompensed either through property division or maintenance award, regardless of need
- b. Difficult to evaluate worth of professional degree, may use theory that best achieves fairness and justice

Meyer v Meyer

[2000 WI 132](#)

[239 Wis. 2d 731](#)

- c. Contributions outside of marriage may be considered

[§_56\(1c\)\(j\)](#)

10) Other factors as Ct deems relevant in individual case

Schmitt v Schmitt

[2001 WI App 78](#)

[242 Wis. 2d 565](#)

- a. “Separate lives”—Ct may consider current and long-standing living arrangements and lifestyles of parties

Dixon v Dixon

[107 Wis. 2d 492](#) (1982)

- b. Marital misconduct not a factor

3. Determination of Term of Maintenance

§ 767.56(1c)

Hefty v Hefty

[172 Wis. 2d 124](#) (1992)

A. Award may be for limited or indefinite period of time

- 1) Indefinite—until remarriage or death

Hartung v Hartung

[102 Wis. 2d 58](#) (1981)

Murray v Murray

[231 Wis. 2d 71](#)

(Ct. App. 1999)

- 2) If for limited term, duration must be based on length of time necessary for recipient spouse to become self-supporting at appropriate standard of living
 - a. Based on evidence in record
 - b. Term may be extended
 - See [Sec. 8](#), *infra*

LaRocque v LaRocque

[139 Wis. 2d 23](#) (1987)

- 3) In determining whether to grant limited-term maintenance, Ct must take several considerations into account
 - a. Ability of recipient spouse to become self-supporting by end of maintenance period
 - At standard of living reasonably similar to that enjoyed before divorce
 - b. Ability of payer spouse to continue obligation of support for indefinite time
 - c. Need for Ct to continue jurisdiction regarding maintenance
 - d. Ct must make determination upon basis of facts, not speculation

Schmitt v Schmitt

[2001 WI App 78](#)

[242 Wis. 2d 565](#)

- e. Incentive to payee to become self-supporting

Preiss v Preiss

[2000 WI App 185](#)

[238 Wis. 2d 368](#)

Parrett v Parrett

[146 Wis. 2d 830](#)

(Ct. App. 1988)

B. If Ct limits term of maintenance or holds maintenance open, must explain why

4. Orders During Pendency of Action Under [§_767.225](#)

[§_767.225](#)

A. Ct or CCC may require either party to pay maintenance during pendency of action

- 1) Based on factors considered for final order
- 2) Must be just and reasonable
- 3) See **Tax Checklist**, [FA 7](#), for tax consequences of temporary maintenance

B. Order may be based on written stipulation of parties

[§_767.225\(1n\)\(c\)](#)

C. CCC orders reviewable by Ct

[§_767.17](#)

- 1) Decision of CCC under [Ch 767](#) shall be reviewed by the Judge assigned to the case upon motion of a party
- 2) Decision of CCC may be certified to the Judge assigned to the case, upon a motion for a de novo review

[§_767.17\(1\)](#)

- a. Party must be present at the hearing in order to seek de novo review

[§_767.17\(1\)](#)

- b. Right to de novo review does not apply to stipulations entered into between parties

[§_767.17\(1\)](#)

- c. Notices requesting de novo hearing do not stay the order unless the Trial Court specifically grants a stay of the order

[§_767.17\(2\)](#)

- d. Party must file de novo motion within 20 calendar days of the oral decision of the CCC or within 20 days of the mailing of a written decision of the CCC if the decision was not given orally at the time of the hearing

[§_767.17\(2\)](#)

As set forth in [§_801.15\(1\)](#), 20 calendar days are counted consecutively and include weekends and holidays

§_767.17(3)

- 3) De novo hearing must be held no later than 60 days from the date of filing of the motion

Jahimiak v Jahimiak

[2024 WI App 5](#)

[410 Wis. 2d 557](#)

But this timeline is directory, not mandatory

Haugan v Haugan

[117 Wis. 2d 200](#) (1984)

D. Temporary maintenance paid during pendency of action should not be subtracted from receiving spouse's property or maintenance in final order

§_767.273

E. Temporary maintenance pending appeal

- 1) Must be made in Trial Ct after entry of judgment but before return of record to appellate Ct
- 2) May allow temporary maintenance before appeal taken, conditioned on taking of appeal

5. Judge-Approved Stipulated Initial Orders Before Judgment Under §_767.333

§_767.333

A. Parties must file a written stipulation with the Ct, specifying the terms of that agreement

B. Before entering an initial order based on the stipulation, the Judge must hold a hearing on the record with both parties and the child support agency, if a party, to determine the parties' understanding of the stipulation and ensure it is intended by both parties as the initial order on the terms set forth

- 1) Hearing may be held in person, via telephone, video, or electronic means, and a party or a party's Atty may appear via telephone or video for good cause shown, but each party must attend the hearing
- 2) [Sec. 767.333](#) requires stipulations under that statute to be approved by a Judge likely because the case remains contested until all issues are resolved; therefore, partial stipulations under §_767.333 are not available for approval by a CCC pursuant to §_757.69(1)(p)1.

C. Before a Judge may approve a stipulation relating to maintenance, the Judge must comply with statutory requirements otherwise applicable to such determinations in actions affecting the family under current law

D. A party seeking modification of a stipulation on maintenance must comply with existing statutory requirements for revision of maintenance orders

6. Court-Approved Stipulations Under §_767.34

A. Parties may stipulate to maintenance during the pendency of the action. See [Secs. 4](#) and [5](#), *supra*, for requirements

§_767.34

B. Parties may stipulate as to whether maintenance will be paid, in what amount, and for what period of time

Rintelman v Rintelman

[118 Wis. 2d 587](#) (1984)

Jacobson v Jacobson

[177 Wis. 2d 539](#)

(Ct. App. 1993)

- 1) May stipulate to continuation of payments after remarriage; must be incorporated into judgment

Comment

- 2) May stipulate to waive maintenance, but agree to payments under [IRC](#) § 71 (repealed by Pub L No 115-97, §_11051, 131 Stat 2054 (2017)), which are fixed in term and amount. Parties often refer to [IRC](#) § 71 when they stipulate to nonmodifiable maintenance. The repeal of [IRC](#) § 71 affects only the taxability of maintenance, not whether it is modifiable

Ross v Ross

[149 Wis. 2d 713](#)

(Ct. App. 1989)

- 3) Parties may agree and stipulate to waive maintenance

- a. Parties may agree to a provision in judgment for limited-term, periodic spousal-support payments

- b. Payments are not subject to modification by either party

Nichols v Nichols

[162 Wis. 2d 96](#) (1991)

- Does not violate public policy for Ct to enforce stipulated divorce judgment that includes provisions Ct on its own could not have ordered

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

Ayres v Ayres

[230 Wis. 2d 431](#) (1999)

C. Stipulations are recommendation of parties not binding on Ct

When Ct adopts stipulation, makes it part of judgment and does so on own responsibility

Evenson v Evenson

[228 Wis. 2d 676](#) (1999)

Miner v Miner

[10 Wis. 2d 438](#) (1960)

D. Ct must examine carefully, against background of full information on parties' economic status and resources

E. Examine parties to ensure

- 1) They understand the stipulation

- 2) They entered into the stipulation freely and voluntarily

F. Ct may modify stipulation in interest of justice

Comment

If so, should give parties an opportunity to accept modification, or repudiate stipulation and try case as contested proceeding

Norman v Norman

[117 Wis. 2d 80](#)

(Ct. App. 1983)

G. If either party repudiates stipulations before trial, must set case for trial as contested proceeding

Polakowski v Polakowski

[2003 WI App 20](#)

[259 Wis. 2d 765](#)

Same procedure applies to postjudgment proceedings

7. Findings, Conclusions, and Order

Haugan v Haugan

[117 Wis. 2d 200](#) (1984)

A. Prerequisites

- 1) Based on facts in record

Steinke v Steinke

[126 Wis. 2d 372](#) (1985)

- 2) Ct must fully articulate reasons for decision, on basis of legislative and case law standards

Wright v Wright

[92 Wis. 2d 246](#) (1979)

B. May hold maintenance award open to retain jurisdiction to award maintenance in the future

- 1) Must state reasons for decision

Grace v Grace

[195 Wis. 2d 153](#)

(Ct. App. 1995)

- 2) If holding open for limited purpose, must be specifically expressed in judgment

[§_767.57\(1\)](#)

C. Shall direct payment of maintenance to DCF or designee

[§_767.58\(1\)\(a\)](#)

- 1) Shall order both parties to notify CSA of any change in address within 10 business days after change

[§_767.58\(1\)\(b\)](#)

- 2) Shall order payer to notify CSA and payee within 10 business days after change of employer and any substantial change in amount of payer's income affecting ability to pay maintenance

To include statement that clarifies that notification will not result in change of order unless revision sought

§_767.58(1)(c)

- 3) Shall order payee to notify the Ct and the payer within 10 business days after payee's remarriage

§_767.251(1)

D. Shall warn parties that disobedience of maintenance order punishable as contempt with possible imprisonment, along with costs and expenses of proceeding

§_767.75(1f)

E. Order is assignment of income

§_767.75(2r)

- 1) Assignment must take effect immediately unless payer establishes that irreparable harm likely to occur

- 2) See **Other Enforcement**, [FA 5](#)

8. Revision and Modification of Final Orders and Judgments

§_767.59(1c)

A. Ct may revise maintenance order, from time to time

- 1) If judgment provided for maintenance, or Ct expressly held open case to retain maintenance jurisdiction

Wright v Wright

[92 Wis. 2d 246](#) (1979)

Judgment requiring specific acts, e.g., maintenance of insurance policy and payment of medical expenses, retains jurisdiction only on those issues

- 2) Upon petition, motion, or order to show cause of either party

Polakowski v Polakowski

[2003 WI App 20](#)

[259 Wis. 2d 765](#)

- 3) Parties' agreement/stipulation to modify not binding until approved by Ct

§_767.59(1c)

- 4) Ct has authority to

- a. Revise amount of maintenance, and

- b. Make judgment about any matters Ct might have made in original action

VanderPerren v

VanderPerren

[105 Wis. 2d 219](#) (1982)

- c. Increase, reduce, or terminate maintenance on motion

- d. Extend limited maintenance

- See [Sec. B.](#) below

*Rohde-Giovanni v
Baumgart*
[2004 WI 27](#)
[269 Wis. 2d 598](#)

e. Limit indefinite maintenance

Brin v Brin
[2014 WI App 68](#)
[354 Wis. 2d 510](#)

f. Reduce maintenance to zero, but hold maintenance open in the future

§ 767.59(1m)
Strawser v Strawser
[126 Wis. 2d 485](#)
(Ct. App. 1985)

5) Ct may not revise amount of maintenance due before date notice of action given to respondent

Kenyon v Kenyon
[2004 WI 147](#)
[277 Wis. 2d 47](#)

6) For purposes of evaluating a substantial change in circumstances, the appropriate comparison is to the set of facts that existed at the time of the most recent maintenance order, whether that is the original judgment or a previous modification order

Whitford v Whitford
[2000 WI App 18](#)
[232 Wis. 2d 38](#)

7) Parties may be estopped from obtaining a revision

a. When judgment incorporates stipulation Ct could not have entered without parties' agreement, and

Patrickus v Patrickus
[2000 WI App 255](#)
[239 Wis. 2d 340](#)

- Maintenance agreement stipulation is fair when it operates equally on both parties. Estoppel does not lie when one party can change and another cannot

b. Stipulation entered into freely and knowingly, and

c. Overall settlement is fair, just, legal, and not against public policy

B. Limited maintenance

1) May be extended

Dixon v Dixon
[107 Wis. 2d 492](#) (1982)

a. If petition for revision filed before termination date of order

Lippstreu v Lippstreu
[125 Wis. 2d 415](#)

(Ct. App. 1985)

- Termination date is date last payment is due

Fobes v Fobes

[124 Wis. 2d 72](#) (1985)

- If limited maintenance established by Ct order
- If established by stipulation of parties, and Ct could have made order at time of initial judgment

Murray v Murray

[231 Wis. 2d 71](#)

(Ct. App. 1999)

- Potential for extension acts as “safety net” for limited-term payee who is unable to become self-supporting, has not malingered and has accepted as much employment as possible

2) Termination or modification

Rosplock v Rosplock

[217 Wis. 2d 22](#)

(Ct. App. 1998)

Party petitioning to terminate or modify limited-term maintenance bears burden to show purposes of limited-term maintenance have been met

C. Criteria for revision

§ 767.56

Rohde-Giovanni v

Baumgart

[2004 WI 27](#)

[269 Wis. 2d 598](#)

Fobes v Fobes

[124 Wis. 2d 72](#) (1985)

Benn v Benn

[230 Wis. 2d 301](#)

(Ct. App. 1999)

- 1) Substantial change of financial circumstances warranting modification, giving consideration to both the support and fairness objective. See [Sec. 1.A.](#), *supra*

Murray v Murray

[231 Wis. 2d 71](#)

(Ct. App. 1999)

- When postdivorce events, beyond control of a party, frustrate or impede goals of maintenance

Murray v Murray

[231 Wis. 2d 71](#)

(Ct. App. 1999)

- Burden of proof on person seeking modification

Rohde-Giovanni v

Baumgart

[2004 WI 27](#)

[269 Wis. 2d 598](#)

- Not a retrial of issue in original judgment but focus on change in financial circumstances of both parties

Rohde-Giovanni v Baumgart
[2004 WI 27](#)
[269 Wis. 2d 598](#)

- d. Apply same criteria if order reached by contest or stipulation

Van Gorder v Van Gorder
[110 Wis. 2d 188](#) (1983)

- 2) Cohabitation with member of opposite sex does not automatically require modification of maintenance
 - a. Must show change in payee spouse's financial needs, or
 - b. That living arrangement was fashioned for purposes of avoiding modification of maintenance

Popp v Popp
[146 Wis. 2d 778](#)
 (Ct. App. 1988)

- c. Motivation for cohabitation is relevant factor for Ct to consider in terminating maintenance

Eckert v Eckert
[144 Wis. 2d 770](#)
 (Ct. App. 1988)

- 3) Payer's discharge in bankruptcy of obligation to pay property division equalization and a joint credit card debt supports finding of substantial change in circumstances warranting Ct's review of maintenance
 - a. Exercise of judicial power to modify spousal support post-bankruptcy not antagonistic to federal "fresh start" policy of bankruptcy relief
 - b. See **Tax Checklist**, [FA 7](#)

Poindexter v Poindexter
[142 Wis. 2d 517](#) (1988)

- 4) Use of marital property income to satisfy premarital obligation NOT allowed if property would have been property of non-obligated spouse but for Marital Property Act

[§_766.55\(2\)\(c\)](#)

- a. However, when income accrues to obligated spouse, all of it is subject to the premarital obligation, even if income classified as marital property
- b. Ct may not consider income of new spouse in determining whether maintenance should be modified

Poindexter v Poindexter
[142 Wis. 2d 517](#) (1988)

- 5) Ct considerations

- a. Same factors governing original determination of maintenance set forth in [§_767.56\(1c\)](#)

- Threshold issue is “whether the parties met their burden of establishing a substantial change in circumstances after the divorce warranting a modification of maintenance”
- b. Ct not obligated to consider all factors enumerated, but must consider those factors relevant to case
- c. Percentage award appropriate in circumstances in which payer has demonstrated ability to control own income level
- d. Payer’s lessened ability to pay is factor to be considered even if payee’s need increases

Plonka v Plonka

[177 Wis. 2d 196](#)

(Ct. App. 1993)

- e. Income from assets awarded at time of divorce along with new postdivorce sources of income should be examined

Olski v Olski

[197 Wis. 2d 237](#) (1995)

Seidlitz v Seidlitz

[217 Wis. 2d 82](#)

(Ct. App. 1998)

- f. Assets acquired after divorce (not included in property division)
 - Not double counting to consider portion of pension earned after divorce as income even though pension earned before divorce was counted as asset for purposes of property division

Wettstaedt v Wettstaedt

[2001 WI App 94](#)

[242 Wis. 2d 709](#)

- Not double counting to consider pension distributions in determining substantial change in circumstances if pension divided by QDRO at divorce and no value assigned
- May deduct post-retirement payments from value of pension awarded

D. Ability to pay

Roellig v Roellig

[146 Wis. 2d 652](#)

(Ct. App. 1988)

- 1) “Shirking” exception applies
- 2) If Ct finds that shirking reduced ability to pay
 - a. Limited-term maintenance should be postponed
 - b. Maintenance may be reduced only if payer can show reduced capacity to earn

Carpenter v Mumaw

[230 Wis. 2d 384](#)

(Ct. App. 1999)

- 3) When person is self-employed, order for child support or maintenance does not constitute a “garnishment” under 15 [USC § 1672](#) and hence is not subject to its limitation on withholding

9. Termination/Vacation of Order

[§ 767.59\(3\)](#)

[§ 767.58\(1\)\(c\)](#)

A. Ct shall vacate maintenance order

- 1) On application of payer with notice to payee, and on proof of payee’s remarriage, or upon receiving notice from the payee of the payee’s remarriage,

Rintelman v Rintelman

[118 Wis. 2d 587](#) (1984)

- a. Unless parties have stipulated to continuation of maintenance after remarriage, AND
- b. Stipulation was entered into freely and knowingly, AND
- c. Stipulated settlement is fair, just, legal, and not against public policy

Hansen v Hansen

[176 Wis. 2d 327](#)

(Ct. App. 1993)

Jacobson v Jacobson

[177 Wis. 2d 539](#)

(Ct. App. 1993)

- 2) In disputed case, Ct shall make an equitable determination as to effective termination date by applying such factors as
 - a. Diligence of payer in making application for termination
 - b. Expressions by payer that payments would continue after learning of remarriage
 - c. Payee concealment of remarriage with intent to continue to receive payments
 - d. Ct actions leading payer to believe obligation terminated
 - e. [Sec. 767.59\(1m\)](#), prohibiting retroactive modification of arrearages, does not apply to [§ 767.59\(3\)](#) request to terminate maintenance

[§ 767.56\(2c\)](#)

Rooney v Powell

(*Est of Rooney*)

[19 Wis. 2d 89](#) (1963)

B. At death of payer or payee spouse (whichever occurs first), maintenance terminates unless stipulated otherwise*Appeal of Guenther*

40 Wis. 115 (1876)

Past-due amount may be filed as claim against estate of deceased payer

§_767.264(2)(b)

C. If Ct vacates order, must preserve right of State to collect arrearages owed if either party was recipient of aid under [Ch 49](#)**10. Shirking***See [FA 10](#), Child Support***FA 10: CHILD SUPPORT****1. Purposes**[Ch 105](#), L.1977**A. Legislative intent that standard of living of minor children be maintained at level they would have enjoyed had marriage not ended**

Comment

B. This means child's lifestyle may materially rise or fall with the postdivorce fortunes of the parents**2. Who Is Liable**

§_767.511(4)

A. Ct shall require either or both parents to pay*Ulrich v Cornell*[168 Wis. 2d 792](#) (1992)

1) Obligation created by conception, adoption, or adjudication

a. Also by presumption as when married to mother at conception or birth

b. Stepparent/stepchild relationship alone does not create an obligation to support

- Estopped to deny obligation only upon unequivocal representation to support

§_767.511(5)

2) Liability for past support limited to period after birth of child

But see limitations in cases with paternity determinations based on genetic test results per [§_767.804\(4\)](#), voluntary acknowledgment of paternity cases per [§_767.805\(4m\)](#), and paternity actions per [§_767.89\(4\)](#), which limit liability for past support to the date of the filing of an action, with certain exceptions

[§_767.511\(1j\)](#)

- 3) Child support standard determines amount both parents expected to contribute

If child is in care of third party, each parent's contribution determined by percentage

[§_767.55\(1\)](#)

B. Ct generally may order either or both parents to seek employment or participate in an employment or training program

[§_767.55\(4\)](#)

- 1) BUT special provisions for unemployed teenage parents

a. Unemployed teenage parent

- Is less than 20 years of age
- Is unemployed
- Is financially unable to pay child support
- Would be ordered to pay support but for financial inability to pay

b. Ct shall order unemployed teenage parent to do one or more of the following

- Register for work with unemployment office
- Apply for jobs
- Participate in job training program
- Pursue or continue to pursue accredited instruction leading to high school diploma or equivalent but not if involves expense beyond normal transportation and personal expenses

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

C. Child's entitlement to support does not extend beyond age of majority

However, see *Zimmer v Zimmer*, [2021 WI App 40](#), [398 Wis. 2d 586](#). See *infra* [Sec. 12.C.2](#)

[§_767.511\(4\)](#)

- 1) Any child under age 18, and any child under age 19 who is working toward high school diploma or equivalent, is entitled to support

Resong v Vier

[157 Wis. 2d 382](#)

(Ct. App. 1990)

- 2) Ct cannot independently create trust for post-minority medical or educational needs of children after child support established

[§ 767.511\(2\)](#)

Hubert v Hubert

[159 Wis. 2d 803](#)

(Ct. App. 1990)

- 3) However, Ct can create a trust for post-minority expenses during minority when caregiver requests

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

- 4) Payments to trust must come out of parental income during child's minority

D. Statute of repose, [§ 893.40](#)

[§ 893.40](#)

[§ 893.415](#)

An action to collect judgment must be brought within 20 years after the judgment, but actions to collect arrears may be brought within 20 years after the youngest child reaches the age of majority

St v Hamilton

[2003 WI 50](#)

[261 Wis. 2d 458](#)

NOTE: The provisions in [§ 893.415](#) were specifically enacted by 2003 Wis. Act 287 to address the Ct's decision in *Hamilton*.

3. Monthly Income Available for Support (MIAFS)

[§ 767.511\(1m\)\(bp\)](#)

A. Subsistence allowance

89 FR 2961

(1/17/2024)

- 1) Poverty guidelines established for 2024 are

Size of Household	Poverty Level	Size of Household	Poverty Level
1	\$15,060	4	31,200
2	20,440	5	36,580
3	25,820	Additional	+5,380 ea.

B. Child support standards apply to MIAFS

[Wis Adm Code](#)

DCF 150.02(21)

- 1) MIAFS is parent's annual gross income, including annual income modified for business expenses, together with income imputed from earning capacity, income imputed when no or little information is known, *see* [Wis. Admin. Code](#) § DCF 150.03(3m), or income imputed from assets, divided by 12

[Wis Adm Code](#)

DCF 150.02(13)

- a. Gross income includes monthly wages, salary, interest and investment income, Social Security disability and old age benefits, worker's compensation, unemployment insurance, personal-injury awards intended to replace income, income continuation benefits, deferred income, military allowances and veterans disability compensation benefits (i.e., benefits intended to replace income), and undistributed income from corporation, partnership, or other entity in which parent has ownership interest sufficient to exercise control or access business earnings
 - Undistributed income is federal taxable income, plus claimed depreciation on assets, less reasonable allowance for economic depreciation

— Reasonable allowance for economic depreciation uses IRS straight-line method over useful life of asset

[Wis Adm Code](#)

DCF 150.02(16)

- b. Income modified for business expenses means amount of income after adding wages paid to dependent household members, adding undistributed income *not* reasonably necessary for business growth and subtracting business expenses that Ct determines reasonably necessary to produce that income or operation of business

Derr v Derr

[2005 WI App 63](#)

[280 Wis. 2d 681](#)

- Loan taken out for purposes of making an equalization payment is not a “business expense” under child support income rules

St v Sullivan

[2006 WI App 238](#)

[297 Wis. 2d 430](#)

- Payer has burden to prove that amounts paid by employer to compensate employee's expenses while living away from home were for expenses reasonably necessary to generate income and not ordinary living expenses to support employee's lifestyle

[Wis Adm Code](#)

DCF 150.02(14)

- c. Income imputed based on earning capacity is the amount Ct determines under [Wis. Admin. Code](#) § DCF 150.03(3) if parent has no other income or the difference between the amount Ct determines under [Wis. Admin. Code](#) § DCF 150.03(3) and parent's gross income or income modified for business expenses if parent has actual income

[Wis Adm Code](#)

DCF 150.03(3)

- Parent's incarceration may not be treated as voluntary unemployment for purposes of establishing or modifying a child support order

[Wis Adm Code](#)

DCF 150.03(3)(a)–(q)

- In determining a parent's earning capacity, Ct may consider the following factors:
 - Parent's recent work experience
 - Parent's earnings during previous periods of employment
 - Parent's job skills and training
 - Parent's education
 - Vocational evaluation of parent, if available
 - Parent's diligence in seeking appropriate employment
 - Employment barriers the parent faces, such as homelessness, lack of a driver's license, alcohol or other drug dependence, or immigration status
 - Parent's criminal history and history of incarceration
 - If parent is unemployed, whether unemployment is attributable to parent's job-related misconduct
 - If parent is caretaker of a child common to the parties, the relationship between parent's earning capacity and child-care costs that would be incurred if parent obtained paid employment
 - If parent is the caretaker of a child common to the parties who has unusual emotional or physical needs, whether the child requires that parent's presence in the home
 - Parent's participation in reasonable career or occupational training to establish basic skills or enhance earning capacity
 - Parent's age
 - Location of the parent's residence
 - Parent's receipt of W-2 cash assistance under [§ 49.148](#)

- Parent's receipt of Supplemental Security Income (SSI) under 42 [USC](#) §§ 1381–1383f
- Any other factor that Ct determines is relevant

- See [Sec. 5](#) below (Shirking)

[Wis Adm Code](#)

DCF 150.02(15)

- d. Income imputed from assets is amount of income ascribed to unproductive assets and to which income has been diverted to avoid paying child support or from which income is necessary to maintain children at standard of living they would have had if living with both parents and that exceeds actual income from assets

[Wis Adm Code](#)

DCF 150.03(4)

- Identify and value unproductive or diverted assets
- Multiply value by current 6-month treasury bill rate or other reasonable rate determined by Ct
- Subtract actual income from those assets

Weis v Weis

[215 Wis. 2d 135](#)

(Ct. App. 1997)

- Property not in payer's control not available to impute income

Daniel RC v Waukesha

Cty (Int of Kevin C)

[181 Wis. 2d 146](#)

(Ct. App. 1993)

- e. Ct need not accept tax returns and financial statements at face value but may look beyond for true income

Lellman v Mott

[204 Wis. 2d 166](#)

(Ct. App. 1996)

- f. Absent full financial disclosure, Ct may consider standard of living and lifestyle

2) Gross income, not limited to salary but includes

- a. Cash equivalents and benefits, e.g., expense accounts

[§ 767.75\(1f\)](#)

- b. Commission and lottery prizes payable in installments

Cook v Cook

[201 Wis. 2d 72](#)

(Ct. App. 1996)

aff'd [208 Wis. 2d 166](#)

(1997)

Hokin v Hokin

[231 Wis. 2d 184](#)

(Ct. App. 1999)

c. Retirement benefits

- Because child receives nothing from property division, including property division funds for child support is counting funds for first time between parent and child
- Whether to count such funds for child support is considered on case-by-case basis; Ct to use discretion to fashion equitable scheme, considering property division, child support, and any maintenance together

Hommel v Hommel

[162 Wis. 2d 782](#) (1990)

d. Interest on money market and other investments, even if part of original marital estate at time of property division

Johnson v Johnson

[78 Wis. 2d 137](#) (1977)

e. Accounts receivable of partnership, if not considered asset for property division

Stephen LN v Kara LH

(Paternity of

Ashleigh NH)

[178 Wis. 2d 466](#)

(Ct. App. 1993)

f. Per diem payments to the extent not actually used to reimburse for expenses

Grohmann v Grohmann

[180 Wis. 2d 690](#)

(Ct. App. 1993)

3) Trusts for benefit of support payer

a. Ct cannot order trustees to make distribution that is left to their discretion

Grohmann v Grohmann

[189 Wis. 2d 532](#) (1995)

- b. If trust beneficiary/support payer required to report trust income as own, percentage standards apply to such income, regardless of whether there is any distribution, unless unfairness is otherwise established

Stevenson v Stevenson

[2009 WI App 29](#), ¶ 28

[316 Wis. 2d 442](#)

c. Applies regardless of whether it is a grantor or non-grantor trust

Derr v Derr

[2005 WI App 63](#)

[280 Wis. 2d 681](#)

4) Approximation of income

- a. Uncooperative party cannot be heard to complain of Ct's rough approximation of income when that party had precise information in own control but refused to disclose it

C. Not considered income

§ 49.46

Thibadeau v Thibadeau

[150 Wis. 2d 109](#)

(Ct. App. 1989)

- 1) AFDC/W-2, Medical Assistance payments
- 2) Other child support
- 3) Pell grants and educational loans excluded under federal law
- 4) Wis Higher Education Grants if recipient is AFDC/W-2 recipient

Langlois v Langlois

[150 Wis. 2d 101](#)

(Ct. App. 1989)

- 5) SSI payments

Winters v Winters

[2005 WI App 94](#)

[281 Wis. 2d 798](#)

Weis v Weis

[215 Wis. 2d 135](#)

(Ct. App. 1997)

- 6) Partnership and subch S corporation income if:
 - a. Inability to control distribution of income or
 - b. Valid business reason to retain earnings

[Wis Adm Code](#)

DCF 150.02(13)(a)8.

- 7) Military allowance attributable to area variable housing costs

4. Support Determination

A. Procedure in determining support

- 1) Determine MIAFS—See [Sec. 3](#) above
- 2) Determine type of placement—See below
- 3) Apply appropriate designated percentage to MIAFS

4) Make deviation determinations, if appropriate—See [Sec. 5](#) below

[§_767.225\(1\)\(c\)](#)

[§_767.511\(1\)\(a\)](#)

5) Must express as fixed sum unless

[§_767.34\(2\)\(am\)](#)

- a. Parties stipulate to use percentage, and
- b. State not a real party in interest, and
- c. Payer not subject to any other order in any other action for payment of child or family support or maintenance, and
- d. All payment obligations included in support order, other than annual disbursement fee, are expressed as percentage of payer's income

[§_767.58\(1\)](#)

6) Every order for child support shall include an order stating that

[§_767.58\(1\)\(a\)](#)

- a. Payer and payee must notify Child Support Agency (CSA) of any change of address within 10 business days, and

[§_767.58\(1\)\(b\)](#)

- b. Payer must notify CSA and payee of change of employment and any substantial change in income, including receipt of bonus compensation, within 10 business days

[§_767.58\(1\)\(b\)](#)

- c. Notification of substantial change will NOT result in change of order unless revision sought

7) See also [Sec. 14](#), Appendices 1–5

[§_767.511\(1j\)](#)

B. DCF child support standard (see [Wis. Admin. Code](#) Ch DCF 150) presumptively mandatory

[Wis Adm Code](#)

DCF 150.04

1) Child support standard is modified for special circumstances

[Wis Adm Code](#)

DCF 150.04(1)

- a. Serial families—See [Sec. E](#). below

[Wis Adm Code](#)

DCF 150.04(3)

- b. Split placement of children—See [Sec. F](#). below

Mary LO v Tommy RB

(*Paternity of Tukker MO*)

[189 Wis. 2d 440](#)

(Ct. App. 1994)

rev'd in part, aff'd in part

[199 Wis. 2d 186](#) (1996)

- c. In high-income cases, use of percentage standards alone is erroneous exercise of discretion when amount paid would exceed current support needs

[Wis Adm Code](#)

DCF 150.04(6)

- d. Ct may apply any combination of special circumstance provisions under [Wis. Admin. Code](#) § DCF 150.04(1)–(5) to determine child support obligation

§ 767.501(2)(b)

- 2) Must be expressed as fixed sum unless parties stipulate and other requirements are met

§ 767.511(1m)

- 3) Statutory factors also establish grounds for modification (See [Sec. 5](#) below), including subsistence allowance (See [Sec. 3.A.](#) above)

Luna v Luna

[183 Wis. 2d 20](#)

(Ct. App. 1994)

- 4) Ct erroneously exercises its discretion when it acts to deprive State of reimbursement for AFDC or Medical Assistance without relying on factors to justify deviation

[Wis Adm Code](#)

DCF 150.035(1)

C. Shared-placement support determination (*See infra* [App. 5](#))

- 1) Applies when both parents have placement at least 25% or 92 days a year

Randall v Randall

[2000 WI App 98](#)

[235 Wis. 2d 1](#)

- 2) Use of the shared-time formula is presumptive
- 3) Determination of shared-placement support

- a. Determine each parent's MIAFS

[Wis Adm Code](#)

DCF 150.03(1)

- b. Multiply each parent's MIAFS by designated percentage

- c. Multiply each result by 150%

[Wis Adm Code](#)

DCF 150.035(1)(b)3. note

- d. Note: The 150% accounts for expenditures duplicated by both parents (bedroom, clothes, and personal items).

- e. Multiply each result by portion of time child spends with other parent

[Wis Adm Code](#)

DCF 150.035(1)(ar)

4) “Equivalent care” beyond scheduled overnight care

[Wis Adm Code](#)

DCF 150.035(1)(ar)1.

- a. Placement may include periods when parent is caring for child that is not overnight, but that Ct determines require parent to assume basic support costs substantially equivalent to what parent would spend to care for child overnight

[Wis Adm Code](#)

DCF 150.035(1)(ar)2.

- b. No duplicate credit allowed

- Parent may not receive credit for equivalent care of the child during a period that is within 24 hours of a period for which the parent receives credit for overnight care of the child, unless the other parent is providing overnight care the night before and night after the period when the equivalent care is provided

[Wis Adm Code](#)

DCF 150.035(1)(ar)3.

- c. A block of time during which parent cares for child for at least 6 hours may be considered a half-day equivalent if the parent provides a meal during the period. Two half-day blocks are an equivalent of one overnight

Evenson v Evenson[228 Wis. 2d 676](#)

(Ct. App. 1999)

- d. Ct not strictly bound and may deviate to account for certain but unscheduled additional time in payer’s placement

Maritato v Maritato[2004 WI App 138](#)[275 Wis. 2d 252](#)

- e. To receive credit for “equivalent care,” care must be something of substance: something more than just care that would occur following overnight placement

Rumpff v Rumpff[2004 WI App 197](#)[276 Wis. 2d 606](#)

- Providing an evening meal is not equivalent of overnight care

[Wis Adm Code](#)

DCF 150.035(1)(b)6.

5) Variable costs

Shall be determined based on a detailed list of the variable costs provided by the parties. Due consideration shall be given to a disparity in the parents’ income and the transportation costs associated with each parent’s respective periods of physical placement

[§_767.511\(1j\)](#)**D. Non-shared placement child support order (*See infra* [App. 1](#))**[§_767.501\(2\)\(b\)](#)

- 1) Must be expressed as a fixed sum unless parties stipulate and other requirements met. See [Sec. A.5](#)) above

[Wis Adm Code](#)

DCF 150.035(2)

2) Parent to pay following percentage of MIAFS

- a. One child — 17%
- b. Two children — 25%
- c. Three children — 29%
- d. Four children — 31%
- e. Five or more children — 34%

[Wis Adm Code](#)

DCF 150.03(6)

3) Payer's child support obligation should be determined before payer's maintenance obligation

[Wis Adm Code](#)

DCF 150.03(10)

4) Ct may order payee to waive dependency exemption contingent on receipt of child support payments

See **Tax Checklist**, [FA 7, Sec. 3](#)

[Wis Adm Code](#)

DCF 150.04(1)

E. Serial family modification

[Wis Adm Code](#)

DCF 150.02(25)

- 1) Adjustment permitted by formula for parent with existing obligation to support a child (intact family or an actual support order) who incurs an additional obligation for child support
 - a. Formula = MIAFS less actual support amount or guideline support obligation, whichever is higher
 - b. When children legally under payer's care not subject to Ct order: calculate presumptive support for current family using designated percentage, subtract from MIAFS, and then multiply percentage for noncustodial children

Sommerfield v

Sommerfield

[154 Wis. 2d 840](#)

(Ct. App. 1990)

2) Applicable when payer has more than one legal support obligation

Other obligation may consist of any legal obligation, either by support order or as custodial parent

Brown v Brown

[177 Wis. 2d 512](#)

(Ct. App. 1993)

3) Applicable only to second and subsequent family obligations

Molstad v Molstad

[193 Wis. 2d 602](#)

(Ct. App. 1995)

Note: Even though they do not give parent serial-family parent status, children of an intact subsequent marriage may be considered in Ct's determination to deviate from percentage standard when modifying level of support for children from first marriage

4) Applicable to all units in the serial family situation

[Wis Adm Code](#)

DCF 150.04(3)

F. Split-placement support determination

[Wis Adm Code](#)

DCF 150.02(27)

1) Split placement when payer has two or more children and has custody of one but not all of them

[Wis Adm Code](#)

DCF 150.04(3)

2) Formula for split-placement support obligation

a. Determine payer's support obligation for the number of children not in payer's custody

b. Determine payee's support obligation for the number of children not in payee's custody

c. Payer pays difference between the two amounts

[Wis Adm Code](#)

DCF 150.04(4)

G. Low-income payers

[Wis Adm Code](#)

DCF 150 App. C

1) Use chart from [Wis. Admin. Code](#) Ch DCF 150 App. C when payer's total economic circumstances limit ability to pay designated percentage

2) If payer's MIAFS is below lowest income level in chart, Ct may set an amount appropriate for payer's total economic circumstances, which may be lower than lowest support amount in chart

[Wis Adm Code](#)

DCF 150.04(5)

H. High-income payers

1) Ct may, but not required to, use reduced percentages in calculating support for the high-income payer; percentages apply to that portion of income that falls in each income bracket

MIAFS	1	2	3	4	5+
< 7,000	17%	25%	29%	31%	34%
≤ 12,500	14%	20%	23%	25%	27%
> 12,500	10%	15%	17%	19%	20%

Hubert v Hubert

[159 Wis. 2d 803](#)

(Ct. App. 1990)

- 2) Proper to continue child's higher standard of living enjoyed during marriage

Parrett v Parrett

[146 Wis. 2d 830](#)

(Ct. App. 1988)

- 3) Need of children for support governs, and if standard percentage results in support far beyond such needs, use of standard percentages may be erroneous exercise of discretion and deviation proper

Ayres v Ayres

[230 Wis. 2d 431](#)

(Ct. App. 1999)

- 4) Proper to deviate from standards when
 - a. Excessive amount will be detrimental to values parents instilled in child
 - b. Payments would, in effect, constitute maintenance

5. Deviation from Child Support Standard—Shirking

§ 767.511(1m)

A. Deviation from standards (*See infra* [App. 6](#))

- 1) Ct may modify [Wis. Admin. Code](#) standard (*see* [Wis. Admin. Code](#) Ch DCF 150) if Ct determines, by greater weight of credible evidence, that standard unfair to child or any party

Jarman v Welter

[2006 WI App 54](#)

[289 Wis. 2d 857](#)

- 2) Deviation involves exercise of discretion, requiring Ct to articulate its reasons based on facts of record and correct legal standard; erroneous for Ct to have “general policy” when statute calls for exercise of discretion
- 3) Modification must be requested by party

4) Ct must consider following statutory factors

- a. Financial resources of child
- b. Financial resources of both parents
- c. Maintenance received by either party
- d. Needs of each party to support self at level equal to or greater than federal poverty line established under 42 USC § 9902(2). (See Subsistence Allowance, [Sec. 3.A.](#), *supra*)

St v Alonzo R
(Paternity of Wala P)
[230 Wis. 2d 17](#)
 (Ct. App. 1999)
[Wis Adm Code](#)
 DCF 150.04(1)(b)8.

- Level of support that brings payer's income below poverty level may be a factor justifying deviation from designated percentage

e. Needs of any person, other than child, whom either party legally obligated to support

Molstad v Molstad
[193 Wis. 2d 602](#)
 (Ct. App. 1995)

- Children of intact subsequent marriage may be considered in Ct's determination to deviate from percentage standard when modifying level of support for children from first marriage, even though they do not give parent serial-family parent status

f. Standard of living child would have had if no annulment, divorce, or legal separation

Cameron v Cameron
[209 Wis. 2d 88](#) (1997)

- Not capped at standard of living enjoyed at time of divorce but accommodates parents' subsequent financial prosperity or adversity

g. Desirability that custodian remain in home as full-time parent

h. Cost of child care if custodian works outside home, or value of custodial services performed by custodian if custodian remains in home

McLaren v McLaren
[2003 WI App 125](#)
[265 Wis. 2d 529](#)

- Absent finding of grounds for deviation, Ct cannot order parent to pay portion of child care costs in addition to percentage standard

- i. Award of substantial periods of physical placement to both parents
- j. Extraordinary travel expenses incurred in exercising right to periods of physical placement
- k. Physical, mental, emotional health needs of child, including costs of health insurance provided under [§ 767.513](#)
- l. Child's educational needs
- m. Tax consequences to each party
- n. Best interests of child
- o. Earning capacity of each parent based on education, training, and work experience and availability of work in or near parent's community
- p. Any other factors Ct determines relevant

Wall v Wall
[215 Wis. 2d 595](#)
 (Ct. App. 1997)

- Taxable event that does not result in an increase in payer's net worth and ability to pay support does not need to be included in payer's gross income and may justify deviation from percentage standards from that taxable event

Luciani v Montemurro-Luciani
[199 Wis. 2d 280](#) (1996)

- 5) Burden of proof on party requesting deviation from percentage standards to establish unfairness by greater weight of credible evidence

[§ 767.511\(1n\)](#)

- 6) If, after considering statutory factors, Ct finds standard unfair, Ct shall state in writing or on the record
 - a. Amount of support using percentage standards
 - b. Amount of deviation from percentage standard
 - c. Reasons for finding use of percentage standard is unfair
 - d. Reasons for amount of modification, and
 - e. Basis for modification

Modrow v Modrow
[2001 WI App 200](#)

[247 Wis. 2d 889](#)

- 7) Payer's incarceration is factor for Ct to consider when setting or modifying support; may set at earning capacity

Rottscheit v Dumler

[2003 WI 62](#)

[262 Wis. 2d 292](#)

- a. Incarceration alone is insufficient for Ct to modify, or refuse to modify, child support order

Rottscheit v Dumler

[2003 WI 62](#)

[262 Wis. 2d 292](#)

Modrow v Modrow

[2001 WI App 200](#)

[247 Wis. 2d 889](#)

Parker v Parker

[152 Wis. 2d 1](#)

(Ct. App. 1989)

- b. Ct may consider intentional nature of act, length of sentence, amount of arrearage that would build up, payer's assets, effect on payer's future income, how needs of children will be met during payer's incarceration, and other relevant factors

Rottscheit v Dumler

[2003 WI 62](#)

[262 Wis. 2d 292](#)

- c. Wis Supreme Ct has adopted developing law from Wis Ct of Appeals, including factors noted above

B.

“Shirking” Defined (*See infra* [App. 7](#))

Van Offeren v

Van Offeren

[173 Wis. 2d 482](#)

(Ct. App. 1992)

- 1) Reasonableness of support obligation is measured by needs of custodial parent and ability of noncustodial parent to pay

Smith v Smith

[177 Wis. 2d 128](#)

(Ct. App. 1993)

Rule is subject to shirking exception under which Ct sets support based on earning capacity rather than on actual earnings

Roberts v Roberts

[173 Wis. 2d 406](#)

(Ct. App. 1992)

- 2) Shirking is voluntary or self-inflicted change that unreasonably reduces or terminates income in light of a support obligation

Kelly v Hougham

[178 Wis. 2d 546](#)

(Ct. App. 1993)

- 3) Right of obligor to make career decisions that may diminish income available for support is a qualified rather than an absolute right

Scheuer v Scheuer

[2006 WI App 38](#)

[298 Wis. 2d 250](#)

Van Offeren v

Van Offeren

[173 Wis. 2d 482](#)

(Ct. App. 1992)

- 4) Even when voluntary reduction in income is well intended, question of shirking must be assessed as to reasonableness of decision leading to reduced income in light of obligated person's support obligation

C. Shirking: Specific factors and situations

Chen v Warner

[2005 WI 55](#)

[280 Wis. 2d 344](#)

- 1) No set list of factors is decisive in the shirking determination. For list of some factors to consider see [App. 8](#), *infra*

Edwards v Edwards

[97 Wis. 2d 111](#) (1980)

- 2) Parent willfully or intentionally decreases earnings

Chen v Warner

[2005 WI 55](#)

[280 Wis. 2d 344](#)

See [Sec. B.4](#)), above

- 3) Parent is not diligently working at occupation best suited for

Kelly v Hougham

[178 Wis. 2d 546](#)

(Ct. App. 1993)

- 4) Good-faith return for previously planned post-graduate education, which will increase future ability to support, is permissible career choice decision that should be considered in setting or modifying child support

Chen v Warner

[2005 WI 55](#)

[280 Wis. 2d 344](#)

- 5) Benefit to children derived from decision to remain unemployed is appropriate factor to consider

Chen v Warner

[2005 WI 55](#)

[280 Wis. 2d 344](#)

- 6) Parent's unrealized expectation that investment income would be sufficient to make parent able to remain home for benefit of children without need for child support subject to reasonableness determination when market conditions change

Weis v Weis

[215 Wis. 2d 135](#)

(Ct. App. 1997)

- 7) Partnership property not in payer's control is not available to impute income

6. Health-Care Component of Support

[§_767.513](#)

A. Ct must specifically assign responsibility for and manner of payment of child's health-care expenses

1) Ct must consider

- a. Whether child covered under parent's health insurance policy or plan at time judgment entered

§_767.513(1)

- Health insurance does not include Medical Assistance provided under [Ch](#) 49

- b. Availability of health insurance to each parent through employer or other organization

- c. Extent of coverage available to child

- d. Costs to parent for coverage of child

2) Ct may order either parent to provide insurance if:

[Wis Adm Code](#)

DCF 150.05(1)(b)1.

- a. It is accessible (providers located within reasonable distance to child's home)

[Wis Adm Code](#)

DCF 150.05(1)(b)2.

- b. It is available at reasonable cost (cost of the insurance policy is less than 10% of the parent's MIAFS)

[Wis Adm Code](#)

DCF 150.05(1)(c)

- c. Ct may not require parent with income at 150% or less of poverty level to enroll a child in a private health insurance plan or contribute to its cost, unless there is no cost to the parent

- See [Sec. 3.A.](#), *supra*, for poverty guidelines

3) If parent required to initiate or continue health-care insurance coverage

§_767.513(2)

- a. Parent shall provide copies of necessary program or policy identification to custodial parent

§_767.513(2)

- b. Parent is liable for any health-care costs for which parent receives direct payment from an insurer

[Wis Adm Code](#)

DCF 150.05(1)(b)3.

- c. Ct may order non-insuring parent to contribute to insurance cost, but amount may not exceed 10% of non-insuring parent's gross income, and contribution may not exceed difference between cost of single coverage and cost to add children to the policy

[Wis Adm Code](#)

DCF 150.05(1)(b)4.

- d. Ct may include contribution for insurance cost as upward or downward child support adjustment

§_767.513(2), (3)
[RMC Form FA-606](#)

- 4) Ct may order payment, including payment of any health insurance premiums, to be withheld from income, sent to DCF or designee, and disbursed to person, insurer, or provider

§_767.513(3)(b)

If Ct does not specify manner in which health insurance premiums to be paid, Ct or Cty CSA authorized to proceed with notice of assignment

Kuchenbecker v Schultz
[151 Wis. 2d 868](#)
 (Ct. App. 1989)

B. Allocation of medical expense responsibility subject to modification upon substantial change of circumstances

7. Security for Child Support; Insurance and Trusts

Vaccaro v Vaccaro
[67 Wis. 2d 477](#) (1975)

A. May require parent to make minor children beneficiaries of life insurance policies to secure support obligation

Pulkkila v Pulkkila
[2020 WI 34](#)
[391 Wis. 2d 107](#)
Richards v Richards
[58 Wis. 2d 290](#) (1973)

- 1) When parent fails to comply, constructive trust imposed on proceeds for benefit of minor children to extent of amount ordered

Tensfeldt v Haberman
[2009 WI 77](#), ¶¶ 34–35
[319 Wis. 2d 329](#)
Cf. Est of Barnes v Hall (Est of Barnes)
[170 Wis. 2d 1](#)
 (Ct. App. 1992)

- 2) Life insurance in divorce may be used to allow estate planning for property benefit of adult children, if parties voluntarily stipulate to do so

§_767.61(4)

Limited right to create property benefit for minor child's support, maintenance, education, and general welfare

Beberfall v Beberfall
[54 Wis. 2d 329](#) (1972)

- 3) Ct may modify requirement upon substantial change of circumstances

B. Support fund trusts

§_767.511(2)

- 1) Ct may set aside portion of child support in trust for support, education, and welfare of children

Cameron v Cameron
[209 Wis. 2d 88](#) (1997)

Applies to repayment of arrearages as well

2) Ct may impose trust under following circumstances

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

a. Stipulation of parties

Hubert v Hubert

[159 Wis. 2d 803](#)

(Ct. App. 1990)

b. Request of custodial party

Kowalski v Obst

(Paternity of Andrew K)

[2003 WI App 218](#)

[267 Wis. 2d 400](#)

c. Ct on own initiative

3) Standards for imposition without primary custodian's consent

Resong v Vier

[157 Wis. 2d 382](#)

(Ct. App. 1990)

a. Custodial parent not to be lightly stripped of ability to make decisions concerning rearing of child

Cameron v Cameron

[209 Wis. 2d 88](#) (1997)

Lyman v Lyman

[2011 WI App 24](#), ¶¶ 24–

26, [331 Wis. 2d 650](#)

b. Party seeking imposition of trust must show necessity by substantial evidence

Cameron v Cameron

[209 Wis. 2d 88](#) (1997)

Lyman v Lyman

[2011 WI App 24](#), ¶¶ 24–

26, [331 Wis. 2d 650](#)

c. Requires factual finding that trust is necessary to best interests of child because primary custodian is incapable of managing or unwilling to manage wisely child support money

Mary LO v Tommy RB

(Paternity of Tukker MO)

[199 Wis. 2d 186](#) (1996)

4) Ct may establish trust out of current income to ensure post-majority support, including higher education needs

a. Appropriate in high-income cases

b. Ct may consider child's need and capacity for higher education

c. Payments to trust must come from child support payments paid during minority

- d. Total support payment can stay within guidelines, while portion exceeding need for current support is placed in trust

8. Orders During Pendency of Action

§_767.225(1)(c)

A. Ct or CCC may require either or both parties to make support payments while action pending

- 1) Must be expressed as fixed sum unless

- a. Parties stipulate to use percentage, and

§_767.34(2)(am)

- b. State not a real party in interest, and

- c. Payer not subject to any other order in any other action for payment of child or family support or maintenance, and

- d. All payment obligations included in support order are expressed as percentage of payer's income

B. Order may be based on written stipulation of parties

§_767.225(1n)

C. CCC orders reviewable by Ct

§_767.17

Review de novo upon request for new hearing on subject of determination, order, or ruling of CCC

§_767.273

D. Temporary support pending appeal

- 1) Must be made in Trial Ct after entry of judgment but before return of record to appellate Ct
- 2) May allow temporary support before appeal taken, conditioned on taking of appeal

E. Case closure order

§_48.355(4g)

§_938.355(4g)

A Juv/children's Ct Judge may enter an order regarding child support in a family Ct action. The order has the same effect as an order issued by the family Ct Judge. It remains the order until the family Ct Judge modifies or terminates the order

9. Stipulations

[§_767.34](#)

A. Parties may stipulate as to child support under [§_767.34](#)

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

- 1) Stipulations are recommendations of parties, not binding on Ct

Comment

Ct may modify in interests of justice but give parties opportunity to accept or repudiate stipulation and try case as contested proceeding

Conrad v Conrad

[92 Wis. 2d 407](#) (1979)

- 2) Ct must examine stipulations carefully with full information on parties' economic status and resources

Hottenroth v Hetsko

[2006 WI App 249](#)

[298 Wis. 2d 200](#)

- 3) No specific procedure required, but Ct should examine, or the record show, that parties:

- a. Understand stipulation and
- b. Entered into stipulation fairly and voluntarily

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

- 4) Ct may order that to which parties stipulated, even if Ct lacks independent statutory authority to do so in absence of stipulation

B. Ct's approval of stipulation under [§_767.34](#)

[§_767.34\(2\)\(a\)](#)

- 1) Ct may not approve stipulation unless it provides for child support determined in manner consistent with [§_767.511](#)

[§_767.34\(2\)\(am\)](#)

- 2) Support cannot be expressed as a percentage of gross income unless all of the following apply:
 - a. State is not a real party in interest; *see* [§_767.205\(2\)\(a\)](#)
 - b. Payer is not subject to any other support or maintenance order
 - c. All payment obligations included in order, other than annual receiving and disbursing fee, are expressed as percentage of payer's income
- 3) Unmodifiable support agreements

Frisch v Henrichs

[2007 WI 102](#), ¶ 75

[304 Wis. 2d 1](#)

a. Parties may stipulate regarding child support, but best interests of child are paramount

May v May
[2012 WI 35](#), ¶ 34
[339 Wis. 2d 626](#)

- Ceilings on child support are presumed to be invalid

May v May
[2012 WI 35](#), ¶ 35
[339 Wis. 2d 626](#)

- Unmodifiable floor on child support that is not limited in duration or that has an excessively long duration may violate public policy

May v May
[2012 WI 35](#), ¶ 36
[339 Wis. 2d 626](#)

- Ct-approved stipulations regarding child support for a limited period of time will be given effect if freely and knowingly made, fair and equitable when entered into, and not illegal or violative of public policy

May v May
[2012 WI 35](#), ¶ 37
[339 Wis. 2d 626](#)

- Ct retains equitable power to consider circumstances, unforeseen by parties when they entered into stipulation, that adversely affect the best interests of the child

b. Enforcement

May v May
[2012 WI 35](#), ¶¶ 36–37
[339 Wis. 2d 626](#)

- Equitable estoppel may preclude challenge to unmodifiable stipulation, BUT

May v May
[2012 WI 35](#), ¶ 37
[339 Wis. 2d 626](#)

- Ct may use equitable power and discretion to refuse to uphold all child support stipulations regardless of whether otherwise enforceable under equitable estoppel

c. Duration

§ 767.59(1f)(b)2.

- [Sec. 767.59\(1f\)](#) provides rebuttable presumption of substantial change in circumstances after 33 months

May v May
[2012 WI 35](#), ¶¶ 28, 46
[339 Wis. 2d 626](#) (citing
Honore v Honore
[149 Wis. 2d 512](#)
 (Ct. App. 1989))

- Wis Ct App has held three-year floor acceptable, but Wis Sup Ct prefers deference to legislature's 33-month presumption; four years appears to be too lengthy

May v May
[2012 WI 35](#), ¶ 46
[339 Wis. 2d 626](#)

- Stipulations relating to point in time that would reasonably support reevaluation might be approved

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

- Wis Sup Ct has approved stipulation that reduced child support during minority in exchange for paying support to age 21

4) See **Tax Checklist**, [FA 7](#)

[§_767.333](#)

C. Judge-approved stipulated initial orders before judgment under [§_767.333](#)

- 1) Before obtaining a judgment of divorce, annulment, or legal separation, the parties may agree to final child support issues
- 2) If the parties reach agreement on one or more child support issues, they shall file a stipulation with the Ct that specifies the agreed-upon terms
- 3) Before entering a stipulation as the final order, the Judge shall conduct a hearing on the record and comply with any requirements under [§_767.511](#)
- 4) A party seeking modification of a stipulation entered under [§_767.333\(3\)](#) must comply with [§_767.59](#)
- 5) [Sec. 767.333](#) requires stipulations under that statute to be approved by a Judge likely because the case remains contested until all issues are resolved; therefore, partial stipulations under [§_767.333](#) are not available for approval by a CCC pursuant to [§_757.69\(1\)\(p\)1.](#)

D. Repudiation/Withdrawal

Polakowski v Polakowski

[2003 WI App 20](#)

[259 Wis. 2d 765](#)

Norman v Norman

[117 Wis. 2d 80](#)

(Ct. App. 1983)

- 1) Until Ct approves and stipulation incorporated into judgment or postjudgment order, either party may withdraw consent, rendering stipulation void

Hottenroth v Hetsko

[2006 WI App 249](#)

[298 Wis. 2d 200](#)

- 2) Once Ct approves, adopts, or incorporates stipulation, it is no longer a recommendation but a decision of Ct, even though not yet reduced to a written judgment

[§_767.333](#)

- 3) A party seeking relief from a stipulation under [§_767.333\(3\)](#) before final hearing can proceed under [§_767.59](#)

Hottenroth v Hetsko

[2006 WI App 249](#), ¶ 32

[298 Wis. 2d 200](#)

- 4) Party may seek relief under [§ 806.07](#) even if party stipulated to provision that party seeks to set aside

E. Enforcement/Estoppel

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

- 1) Ct may enforce that to which parties stipulated, even if Ct lacked independent statutory authority to do so in absence of stipulation

Ross v Ross

[149 Wis. 2d 713](#)

(Ct. App. 1989)

- 2) “Estoppel” used in enforcing divorce stipulation is not true equitable estoppel but describes enforcement of Ct-approved contract between parties

Krieman v Goldberg

[214 Wis. 2d 163](#)

(Ct. App. 1997)

- 3) To invoke estoppel, party must show

a. Both entered into stipulation freely and knowingly

b. Settlement was fair and equitable

Ondrasek v Tenneson

[158 Wis. 2d 690](#)

(Ct. App. 1990)

- A stipulation fair when created does not necessarily make it fair in the future

c. Not illegal or against public policy

Ondrasek v Tenneson

[158 Wis. 2d 690](#)

(Ct. App. 1990)

- Paramount goal of child support—to promote best interests of child and to avoid financial hardship to child of divorced parents—transcends any stipulation of the parties
- See [Sec. 9.B.3](#)) above

Rintelman v Rintelman

[118 Wis. 2d 587](#),

596 (1984)

- 4) Party seeking enforcement need not show specific benefit/detriment bargained for in the agreement—especially if a comprehensive negotiated settlement package

10. Support Order

A. Determination of amount

§_767.511(1)(a)

§_767.34(2)(am)

- 1) Amount of support ordered under §§_767.225, 767.511, or 767.89 must be expressed as fixed sum unless
 - a. Parties stipulate to use percentage, and
 - b. State not a real party in interest, and
 - c. Payer not subject to any other order in any other action for payment of child or family support or maintenance, and
 - d. All payment obligations included in support order, other than annual disbursement fee, are expressed as percentage of payer's income

§_767.58(1)

- 2) Every order for child support shall include an order stating that

§_767.58(1)(a)

- a. Payer and payee must notify CSA of any change of address within 10 business days, and

§_767.58(1)(b)

- b. Payer must notify CSA and payee of change of employer and any substantial change in income, including receipt of bonus compensation, within 10 business days

§_767.58(1)(b)

- c. Notification of substantial change will NOT result in change of order unless revision sought

§_767.553

- 3) Order under §§_767.225 or 767.511 may provide for annual adjustments if amount of support expressed as fixed sum
 - a. No adjustment made unless order so provides
 - b. Adjustment may be made only once in any year
 - c. See [Sec. 13.A.](#) below for full discussion of annual adjustments

Carpenter v Mumaw

[230 Wis. 2d 384](#)

(Ct. App. 1999)

- 4) When a person is self-employed, an order for child support or maintenance does not constitute a “garnishment” under 15 [USC](#) §_1672 and hence is not subject to its limitation on withholding

B. Mandatory inclusions

§_767.513

- 1) Ct must assign responsibility for and direct manner of payment of child's health-care expenses

See [Sec. 6](#), Health-Care Component of Support, this chapter

§_767.511(1)(b)

- 2) Ct must ensure that determination of which party to claim tax exemption for child(ren) made

See **Tax Checklist**, [FA 7, Sec. 3](#)

§_767.57

- 3) Order to direct that payments be made to DCF or designee

§_767.58(1)(a)

- a. Shall order payer and payee to notify CSA under [§_59.53\(5\)](#) of change of address within 10 business days after change

§_767.58(1)(b)

- b. Shall order payer to notify CSA under [§_59.53\(5\)](#) and payee within 10 business days after change of employer and any substantial change in amount of payer's income such that ability to pay support affected

- To include statement that clarifies that notification will not result in change of order unless revision sought

§_767.75(1f)

- 4) Order is assignment of income (income withholding)

- a. Assignment to take effect immediately unless irreparable harm likely

- b. See **Other Enforcement**, [FA 5](#)

§_767.251(1)

- 5) Contempt warning

- a. Written order must warn parties that disobedience of support order is contempt, punishable by possible imprisonment

Turner v Rogers

[131 S. Ct. 2507](#) (2011)

45 [CFR](#) §_303.6(c)(4)

- b. The ability to pay or otherwise comply with the order is the critical issue in a contempt action

§_767.54

- 6) Parties must exchange annual financial information

Recommendation

Include this provision in every judgment

C. Discretionary inclusions

§_767.511(2)

1) May establish separate fund or trust (see also [Sec. 7.B.](#) above)

Resong v Vier

[157 Wis. 2d 382](#)

(Ct. App. 1990)

- a. May set aside portion of support into fund for support, education, and welfare of child during minority
- b. If would protect and promote best interests of child

Rosenheimer v

Rosenheimer

[63 Wis. 2d 1](#) (1974)

- Appropriate when parties consent, or
- When reasonably appears to satisfaction of Ct that obligor will fail or unreasonably resist payment

[§ 767.57\(5\)](#)

- c. Ct may appoint trustee or receiver

Luna v Luna

[183 Wis. 2d 20](#)

(Ct. App. 1994)

St v William W

(Paternity of

Lachelle AC)

[180 Wis. 2d 708](#)

(Ct. App. 1993)

- d. May not order payments into trust to avoid having support used for AFDC reimbursement

[§ 767.77\(2\)](#)

2) Lien, security

- a. May impose liability as charge on specific real estate
 - Becomes effectual when order or certified copy is recorded in appropriate register of deeds office
- b. May require party to give sufficient security for payment

11. Enforcement

See Use of Contempt, [FA 4](#), Other Enforcement, [FA 5](#), and Uniform Interstate Family Support Act, [FA 6](#)

Comm. of Chief Judges

10-16-07 Comm. Minutes

When presented with an order to change venue and send a child support case to another Cty, Judges should make sure that notice of change goes out to parties and child support agencies affected. If dispute as to venue arises, matter should be referred to chief Judge(s) of the district(s)

12. Modifications

§_767.59

A. Upon stipulation or motion of either party, DCF, Cty Dept, or Cty CSA

Polakowski v Polakowski

[2003 WI App 20](#)

[259 Wis. 2d 765](#)

Norman v Norman

[117 Wis. 2d 80](#)

(Ct. App. 1983)

- 1) Until Ct approves and stipulation incorporated into judgment or postjudgment order, either party may withdraw consent, rendering stipulation void

§_767.217

- 2) Notice to CSA if either party is recipient of AFDC/W-2 or Medical Assistance

Jeske v Jeske

[144 Wis. 2d 364](#) (1988)

- 3) CSA has authority to represent party seeking modification of child support

Applies even if neither parent nor child receiving public assistance

§_767.281(4)

- 4) If filed in Cty other than that which granted original divorce, order modifying judgment shall specify that payments of support and arrearages are payable to DCF or designee

§_767.59(1f)

B. Must show substantial change in circumstances

§_767.59(1f)(d)

[RMC Form FA-604A](#)

[RMC Form FA-604B](#)

- 1) Substantial change NOT required for Ct to change to fixed sum manner in which amount of child support expressed in judgment or order

Rosplock v Rosplock

[217 Wis. 2d 22](#)

(Ct. App. 1998)

- 2) Substantial or material change in circumstances is such that it would be unjust or inequitable to strictly hold either party to the judgment

Tozer v Tozer

[121 Wis. 2d 187](#)

(Ct. App. 1984)

- a. Mere change of circumstances does not require modification; change must also be material or substantial

Jacquart v Jacquart

[183 Wis. 2d 372](#)

(Ct. App. 1994)

- b. Even if material or substantial, change does not require modification if need-based support order in fact covers needs (CAUTION: unique support order by stipulation of parties)

Zutz v Zutz

[208 Wis. 2d 338](#)

(Ct. App. 1997)

- c. Prior stipulation of parties, if still meets needs of children, may still govern even if statutory or actual change of circumstances is present

Guzikowski v Kuehl

[153 Wis. 2d 227](#)

(Ct. App. 1989)

3) Burden of establishing substantial change on party alleging it

§_767.127(4)

Failure to provide required annual financial disclosure authorizes Ct to accept as accurate any information provided in statement of other party or obtained under §_49.22(2m) by DCF or Cty CSA

§_767.59(1f)(b)

4) Statute creates rebuttable presumption of material change of circumstances when

- a. Payee has received AFDC/W-2 since last order entered
- b. 33 months have expired since last order unless support expressed as percentage
- c. Payer has failed to furnish timely financial disclosure statement
- d. Support actually ordered differs from what amount would be under percentage standards

§_767.59(1f)(c)

5) Factors that may constitute a substantial change include

- a. Change in payer's income
- b. Change in needs of child
- c. Change in payer's earning capacity

Cameron v Cameron

[209 Wis. 2d 88](#) (1997)

- Not capped at standard of living enjoyed at time of divorce but accommodates parents' subsequent financial prosperity or adversity

Poehnelt v Poehnelt

[94 Wis. 2d 640](#) (1980)

d. Substantial change in cost of living

Sommer v Sommer

[108 Wis. 2d 586](#)

(Ct. App. 1982)

e. Payer's receipt of personal-injury award

Burger v Burger

[144 Wis. 2d 514](#) (1988)

f. Increased expenses caused by child growing older

§_767.59(1f)(c)4.

g. Any other factor Ct determines relevant

Tozer v Tozer

[121 Wis. 2d 187](#)

(Ct. App. 1984)

6) Not erroneous exercise of discretion to refuse modification when payer voluntarily reduces ability to pay

Voecks v Voecks

[171 Wis. 2d 184](#)

(Ct. App. 1992)

Parker v Parker

[152 Wis. 2d 1](#)

(Ct. App. 1989)

a. Incarceration is change of circumstances but, because it is intentional misconduct, it alone may not constitute a substantial change

Kelly v Hougham

[178 Wis. 2d 546](#)

(Ct. App. 1993)

b. Temporary reduction caused by good-faith pursuance of post-graduate education and choice of career is an appropriate case to modify support

7) Once change of circumstances shown, Ct must balance needs of custodial parent and children with ability of other parent to pay

§_767.59(2)(a)

a. If Ct revises support, must use percentage standards

§_767.59(2)(b)

b. May deviate based on same factors and considerations as in setting original support award

Wall v Wall

[215 Wis. 2d 595](#)

(Ct. App. 1997)

- A taxable event that does not result in an increase in payer's net worth and ability to pay support does not need to be included in payer's gross income and may justify deviation from percentage standards for that taxable event

Miller v Miller

[171 Wis. 2d 131](#)

(Ct. App. 1992)

c. If payer has remarried, spouse's income a relevant factor to determine ability to pay but cannot be used to satisfy support obligation

Steven JS v Steven MS

(Paternity of Steven JS)

[183 Wis. 2d 347](#)

(Ct. App. 1994)

- Income of spouse not income of a "dependent household member" under [Wis. Admin. Code](#) definition (now [Wis. Admin. Code](#) § DCF 150.02(9)), because spouse not a "dependent" under [IRC](#)

Evjen v Evjen

[171 Wis. 2d 677](#)

(Ct. App. 1992)

- d. Income of closely held corporation diverted to subsequent wife as dodge to support obligation may be imputed to payer

Abitz v Abitz

[155 Wis. 2d 161](#) (1990)

- Gross income and percentage standard used to revise support as if parent had remained single

§_767.59(1c)

C. Ct's authority

§_767.59(1c)(a)2.

- 1) Ct can make judgment about any matters Ct might have determined in original action

Ondrasek v Tenneson

[158 Wis. 2d 690](#)

(Ct. App. 1990)

- a. Ct not bound by parties' prior stipulation that support could not be modified

Kuchenbecker v Schultz

[151 Wis. 2d 868](#)

(Ct. App. 1989)

- b. Includes modifying provisions regarding child's medical care

§_767.59(1c)(a)1.

- 2) Ct can revise amount of support

§_767.59(1m)

Zimmer v Zimmer

[2021 WI App 40](#)

[398 Wis. 2d 586](#)

- a. Ct may not revise amount of support due before date notice of action given to respondent—this includes modification based on child turning 18 years old when there are other children still subject to support
- b. Exception: To correct previous error in calculation

D. Case closure order

§_48.355(4g)

§_938.355(4g)

A Juv/children's Ct Judge may enter an order regarding child support in a family Ct action. The order has the same effect as an order issued by the family Ct Judge. It remains the order until the family Ct Judge modifies or terminates the order

13. Adjustments and Arrearages

§_767.553

A. Annual adjustments

§_767.553(1)(a)

- 1) Order may provide for annual adjustment based on change in earnings or cost of living

- a. No adjustment may be made unless order so provides
- b. Applies only to orders in which payment expressed as fixed sum based on percentage standard

§_767.553(1)(c)

§_767.54

- c. Ct shall order what information must be exchanged and when (no later than May 1 of each year) to determine any need for adjustment. Information must include:
 - Complete copy of each party's federal and state income tax returns for prior calendar year, including all W-2 forms and 1099 forms
 - A year-end paycheck stub from all sources of employment for the prior calendar year
 - Each party's most recent paycheck stub from all sources of employment, showing year-to-date gross and net income
 - Any other documentation of each party's income from all sources for the 12-month period preceding the exchange of information

§_767.553(2)

[RMC Form FA-604A](#)

- 2) Ct or CCC to provide form for parties to use to stipulate to adjustment of amount

§_767.553(3)

- a. If payer's income changes, parties may implement adjustment by stipulating to changed amount on form
- b. Stipulation effective as of date order signed by Ct

§_767.553(4)(a)

- 3) Any party may file petition, motion, or order to show cause for adjustment if

- a. Party refuses to provide required information, or
- b. Payer's income changes and party refuses to sign stipulation for adjustment

§_767.553(4)(b)

- 4) If Ct determines adjustment should be made, order entered adjusting support by amount determined by Ct

§_767.553(4)(b), (c)

- 5) Adjustment takes effect after date responding party received notice of the action unless

- a. Payee was seeking adjustment and payer established extraordinary circumstances that prevent fulfillment of adjusted obligation

- b. Payer was seeking adjustment and payee establishes payer voluntarily reduced income below payer's earning capacity
- c. Payer was seeking adjustment and payee establishes adjustment would be unfair to child

§_767.553(4)(d)

- 6) If Ct or CCC determines party has unreasonably failed to provide required information, Ct or CCC may award actual costs, including any costs attributable to time missed from employment, and reasonable Atty fees to aggrieved party

§_767.553(5)

- 7) [Sec.](#) 767.553 does not preclude a party's right to seek revision of judgment under [§_767.59](#) or sanctions for remedial contempt under [Ch](#) 785

B. Reconciliation; establishing arrearage by affidavit

§_767.71(1)

- 1) Applies to orders in which support expressed as percentage

§_767.71(2)(a)

- 2) Notice of Reconciliation and Supporting Affidavit must be served by regular mail to last-known address no later than 3 business days after filing

§_767.71(2)(b)

- 3) Notice of Reconciliation shall include

- a. Period of time for which reconciliation is sought
- b. Statement that unless party requests hearing no later than 20 business days after date of notice, Ct may enter order determining amount due under percentage-expressed order
- c. The mailing address to which the request for hearing must be delivered or mailed

§_767.71(2)(c)

- 4) Supporting Affidavit shall state facts supporting a reasonable basis for determining payer's income during period of time for which reconciliation is sought

§_767.71(3)

- 5) Within 10 business days after any request for hearing timely made, Ct shall set hearing and send notice by regular mail to last-known addresses

- a. At hearing, Ct to establish amount due under percentage-expressed order and apply the amount actually paid
- b. Ct to enter repayment order if arrearage is established

§_767.71(4)

- 6) If no request for hearing, Ct to review within 60 days after filing

- a. If affidavit contains reasonable basis for determining payer's income during the period, Ct may enter order determining amount due under percentage-expressed order and enter repayment order if reconciliation results in arrearage
- b. Ct must send order to parties by regular mail at their last-known address

C. Adjustment of arrearages

[§ 767.59\(1r\)](#)

- 1) Allowed if payer proves any of the following circumstances:

- a. Documentary evidence shows, by preponderance of evidence, that payments made directly to payee by check or money order and that not intended as gifts or other voluntary payments

See also Harms v Harms

[174 Wis. 2d 780](#) (1993)

- b. Written agreement shows, by clear and convincing evidence, that payee agreed to accept payments in lieu of support paid per statute
- c. Documentary evidence shows that, for period of unpaid support, child received benefits based on payer's entitlement to federal disability benefits under 42 [USC](#) §§ 401–433

See also Schulz v Ystad

[155 Wis. 2d 574](#) (1990)

- d. By preponderance of evidence, child lived with payer for more than 60 days beyond Ct-ordered period of placement
 - Credit cannot be given if payee seeks to enforce physical placement through criminal or civil process or otherwise shows child's relocation was not mutually agreed upon
- e. By preponderance of evidence, payer and payee resumed living together with the child, and payer directly supported family by paying amounts at least equal to amount of unpaid Ct-ordered support

- 2) Applies to all arrearages regardless of when judgment or order was entered and arrearage accrued

Barbara B v Dorian H

(Paternity of John RB)

[2005 WI 6](#)

[277 Wis. 2d 378](#)

Note: Retroactive application of statute does not violate due-process standards.

Paulhe v Riley

[2006 WI App 171](#)

[295 Wis. 2d 541](#)

- 3) Ct may adjust arrearage or give credit for payments paid to custodial parent on behalf of disabled support payer

Motte v Motte

[2007 WI App 111](#)

[300 Wis. 2d 621](#)

- 4) While [§_767.59\(1r\)](#) prevents Ct from reducing arrearages, it does not prohibit parties from compromising or waiving them subject to Ct approval

Although [§_767.59\(1r\)\(e\)](#) calls for payee to agree to child's transfer to payer, payee's failure to resist such a move during 60-day period can constitute waiver to claim for arrearage

Cameron v Cameron
[209 Wis. 2d 88](#) (1997)

D. Ct can impose postjudgment trust out of support arrearages only if Ct finds trust in best interests of children

See [Sec. 7.B.](#) above

14. Child Support Appendices Under [Wis. Stat. §_767.511](#) & [Wis. Admin. Code](#) Ch DCF 150

Appendix 1

PERCENTAGE & SERIAL FAMILY GUIDELINES			
GUIDELINES Wis. Admin. Code § DCF 150.035(2)		2024 Poverty Guidelines §_767.511(1)(bp) & § 3.A.	
#	%	Per Year	Per Month
1	17%	\$ 15,060	\$ 1,255
2	25%	\$ 20,440	\$ 1,703
3	29%	\$ 25,820	\$ 2,152
4	31%	\$ 31,200	\$ 2,600
5	34%	\$ 36,580	\$ 3,048
For Each Additional Person in Household , Increase By -->		+ 5,380	+ 448

NOTE: The modifications to [Wis. Admin. Code](#) Ch. DCF 150 are not to be considered as a substantial change of circumstances justifying a revision under [§_767.59](#) but are to be used only after a substantial change of circumstances is found on other grounds.

Appendix 2

LOW-INCOME PAYERS Wis. Admin. Code § DCF 150.04(4); Wis. Admin. Code Ch. DCF 150 App. C					
Mo. Income	One Child	Two Children	Three Children	Four Children	Five or More
\$941	\$106	\$155	\$180	\$193	\$211
\$974	\$111	\$164	\$190	\$203	\$223
\$1,007	\$117	\$172	\$200	\$214	\$234
\$1,040	\$123	\$181	\$210	\$225	\$246
\$1,073	\$129	\$190	\$220	\$236	\$259
\$1,106	\$136	\$199	\$231	\$247	\$271
\$1,139	\$142	\$209	\$242	\$259	\$284
\$1,172	\$148	\$218	\$253	\$271	\$297
\$1,205	\$155	\$228	\$265	\$283	\$310
\$1,239	\$162	\$238	\$276	\$295	\$324
\$1,273	\$169	\$249	\$288	\$308	\$338

\$1,306	\$176	\$259	\$301	\$321	\$352
\$1,340	\$184	\$270	\$313	\$335	\$367
\$1,374	\$191	\$281	\$326	\$348	\$382
\$1,408	\$199	\$292	\$339	\$362	\$397
\$1,441	\$206	\$303	\$352	\$376	\$413
\$1,475	\$214	\$315	\$365	\$391	\$428
\$1,509	\$222	\$327	\$379	\$405	\$445
\$1,543	\$230	\$339	\$393	\$420	\$461
\$1,577	\$239	\$351	\$407	\$435	\$478
\$1,611	\$247	\$364	\$422	\$451	\$495
\$1,645	\$256	\$376	\$437	\$467	\$512
\$1,679	\$265	\$389	\$451	\$483	\$529
\$1,713	\$273	\$402	\$467	\$499	\$547
\$1,747	\$283	\$416	\$482	\$515	\$565
\$1,781	\$292	\$429	\$498	\$532	\$583
\$1,815	\$301	\$443	\$514	\$549	\$602
\$1,849	\$310	\$457	\$530	\$566	\$621
\$1,883	\$320	\$471	\$546	\$584	\$640
Court's Discretion	** For incomes below chart, Ct may set amount appropriate for payer's total economic circumstances. On same grounds, Ct may go lower than the amount indicated in Wis. Admin. Code Ch. DCF 150 app. C. Appendix C reflects sliding % on incomes between 75–150% of the federal poverty guidelines.				

Appendix 3

HIGH-INCOME PAYERS Wis. Admin. Code § DCF 150.04(5) & § 4.H. Above					
Monthly Income	One Child	Two Children	Three Children	Four Children	Five or More
≤ \$7,000	17%	25%	29%	31%	34%
\$7,000–12,500	14%	20%	23%	25%	27%
≥ \$12,500	10%	15%	17%	19%	20%

Appendix 4

SPLIT PLACEMENT Wis. Admin. Code § DCF 150.04(3) & § 4.F. Above	
Split Custody Defined: Where each parent has some, but not all, of the children.	
1	Determine 1st parent's support obligation for the number of children <u>not</u> in 1st parent's custody
2	Determine 2nd parent's support obligation for the number of children <u>not</u> in 2nd parent's custody
3	Payer pays the difference between the two amounts

Appendix 5

SHARED PLACEMENT Wis. Admin. Code § DCF 150.035 & § 4.C. Above		
≥ 25% or 92 Overnights or Equivalent	Parent #1	Parent #2

1	Monthly Income Available for Support				
2	Multiply by Designated Percentage				
3	Subtotal: Base Support				
4	Allowance: Duplicated Care Expenses		x 150%		x 150%
5	Subtotal: Adjusted Base Support				
6	# of <u>Other</u> Parent's Overnights or Equivalent				
6a	Divided by Number of Days (or Total Number of Overnights)/Year	÷		÷	
6b	% of <u>Other</u> Parent's Child Care		%		%
7	Amount of Shared-Placement Support (amount in line 5 x % in line 6b)				
8	Offset of amounts in line 7 (Parent #1 – Parent #2 OR Parent #2 – Parent #1)				

Appendix 6

DEVIATION FROM SUPPORT GUIDELINES—§.767.511(1m) & §5. Above

Ct may modify standard under [Wis. Admin. Code](#) Ch. DCF 150
if it finds that the standard is unfair to child or any party

REQUIRED COURT FINDINGS		FACTORS TO BE CONSIDERED	
1	Amount of support using percentage guidelines	1	Financial resources of child
2	Amount of deviation from designated percentage <u>and</u>	2	Financial resources of both parents following property division
3	Reasons for finding use of designated percentage is unfair, <u>and</u>	3	Maintenance received by either party
4	Reasons for amount of modification, <u>and</u>	4	Support needs of each party at level equal to or greater than federal poverty line pursuant to 42 USC 9902(2) [See “Subsistence” Above]
5	Basis for modification	5	Needs of any person, <u>other than child</u> , whom either party is legally obligated to support

	6	Standard of living child would have had if no annulment, divorce, or legal separation
	7	Desirability that custodian remain in the home as full-time parent
	8	Cost of child care/value of custodial services performed by custodian if remains in the home
	9	Award of substantial periods of physical placement to both parents
	10	Extraordinary travel expenses to exercise periods of physical placement
	11	Physical, mental, emotional health needs of child, including costs of health insurance
	12	Child's educational needs
	13	Tax consequences to each party
	14	Best interests of child
	15	Earning capacity based on education, training and work experience, and availability of work
	16	Any other factors Ct determines relevant

Need of child for support governs and if guidelines result in support amount so far beyond such needs, deviation from designated percentage proper; *Parrett v Parrett*, [146 Wis. 2d 830](#) (Ct. App. 1988)

Appendix 7

RULE AGAINST SHIRKING		See § 5 Above
Shirking Defined:		
1	Shirking is to neglect or evade the payment of a reasonable amount of child support through;	
2	A voluntary or self-inflicted reduction in actual income or by not diligently working in occupation best suited for, when;	
3	Facts and circumstances show obligor has a significantly greater earning potential.	
Obligor's Rights & Intent:		
1	Obligor's right to make career decisions is a qualified rather than an absolute right.	
2	A well-intended motive does not prevent a finding of shirking but is a factor to be considered in determining reasonableness.	
Effect of Rule:		
	If shirking is found, Ct sets support based on earning capacity rather than on actual earnings.	

Appendix 8

REASONABLENESS FACTORS (<i>Chen v. Warner</i> , 2005 WI 55 , ¶ 50, 280 Wis. 2d 344)
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1	Number of children at home and their ages, maturity, health, and special needs	7	Earning potential of the parent who forgoes employment outside the home and that parent's efforts to find and retain employment
2	Availability of child-care providers	8	Status of the job market
3	Financial needs of the children	9	Assets and income of each parent and the available resources if a parent is an at-home full- or part-time child-care provider
4	Any detrimental effect on the children's support level if a parent is a full- or part-time at-home child-care provider	10	Hardship and burden on the parent employed outside the home caused by the other parent's decision to forgo employment
5	Age and mental and physical condition of the parents	11	Any other factors bearing on the needs of the children and each parent's ability to fund child support
6	Educational background, training, skills, prior employment, and wage history of each parent	NOTE: <i>Chen v. Warner</i> , 2005 WI 55 , ¶ 51, 280 Wis. 2d 344 , also held that the gender of a parent forgoing employment is not a relevant factor.	

FA 11: QDROs

1. Plans Requiring a Qualified Domestic Relations Order (QDRO)

A. Generally

- 1) Those covered under [IRC](#) § 401(a) and not excluded under [IRC](#) § 411(e)(1), and

29 [USC](#) 1003(b)

29 [USC](#) 1051

29 [USC](#) 1081

29 [USC](#) 1101

- 2) Those covered under Employee Retirement Income Security Act (ERISA) § 4(a) and not exempt or excluded under ERISA § 4(b), 201, 301, or 401

B. Specific plans requiring a QDRO

[IRC](#) § 414(j)

- 1) Defined benefit pension plans

[IRC](#) § 414(i)

- 2) Defined contribution plans (individual account), including

- a. Profit-sharing plans

- b. Stock bonus plans

- c. Money purchase pension plans
- d. Thrift or savings plans
- e. Target benefit plans
- f. Employee stock ownership plans, including stock bonus plans and leveraged and tax credit plans

3) Hybrid plans

- a. Keogh plans
- b. [IRC](#) § 401(k) plans
- c. Simplified employee pension plans

[IRC](#) § 414(e)

- d. Selected church plans

4) Tax-deferred annuities (TIAA-CREF, etc.)

[§ 40.08\(1m\)](#)
Johnson v Masters
[2013 WI 43](#)
[347 Wis. 2d 238](#)

C. Wis Retirement System

2. Plans That Do Not Require a QDRO but May Be Divided by a Domestic Relations Order (DRO)

[IRC](#) § 411(e)

A. Plans excluded under IRC minimum vesting standards

[IRC](#) § 414(d)

- 1) Federal, State, Cty, and municipal retirement plans
- 2) Church plans, when no election under [IRC](#) § 410(d)
- 3) Plans for which no employer contributions made after September 2, 1974
- 4) [IRC](#) § 501(c)(8) or (9) plans

29 [USC](#) 1003(b)

B. Plans excluded under ERISA § 4(b)

- 1) Federal, State, Cty, and municipal retirement plans
- 2) Most church plans
- 3) Worker's compensation, unemployment compensation, or disability insurance
- 4) Plans for nonresident aliens outside USA
- 5) Unfunded excess benefit plans

29 [USC](#) 1051

C. Plans excluded under ERISA § 201

- 1) Employee welfare benefit plans
- 2) Unfunded deferred compensation plans maintained primarily for select group of management or highly compensated employees
- 3) [IRC](#) § 501(c)(8), (9), or (18) plans

[IRC](#) § 501(c)(5)

- 4) Labor organization plans

[IRC](#) § 736

- 5) Payments to retired partners or to deceased partners' successors in interest

[IRC](#) § 408

See [RMC Form PR-1913](#)

- 6) Individual retirement accounts (Note: Transferred per Abridgment of Judgment)
- 7) Excess benefit plans
- 8) Unfunded arrangements to compensate retired employees for benefits that were forfeited by such employees under a pension plan maintained by a former employer before the date plan became subject to ERISA

3. Governmental Plans

A. The following governmental plans include in their provisions method for dividing and distributing benefits

5 [USC](#) 8331–8351

- 1) US Civil Service and Federal Employees Retirement contributions

10 [USC](#) 1408
 10 [USC](#) 1447
 10 [USC](#) 1448
 10 [USC](#) 1450

2) US Military

10 [USC](#) 1408(a)(4)(A)(ii)
Howell v Howell
[137 S. Ct. 1400](#) (2017)

NOTE: Ct cannot divide any portion of pension that veteran waives in order to receive service-related disability benefits.

Schwab v Schwab
[2021 WI 67](#)
[397 Wis. 2d 820](#)

NOTE: The statute of repose, under [§_893.40](#), does not defeat enforcement of a judgment provision with a “when and if” clause.

22 [USC](#) 4054
 22 [USC](#) 4060

3) US Foreign Service

45 [USC](#) 231m

4) Railroad Retirement benefits

5) Social Security benefits

50 [USC](#) 3514

6) Central Intelligence Agency retirement benefits

4. Execution of QDRO

Dewey v Dewey
[188 Wis. 2d 271](#)
 (Ct. App. 1994)

A. Inclusion of pension in property division divests owner of portion awarded to spouse

B. Former owner’s discharge in bankruptcy does not affect portion of pension awarded to spouse

C. Former owner may still be required to execute a QDRO even though former owner had failed to do so before filing in bankruptcy

5. Model QDRO

A. Judicial red flags and helpful hints noted on model QDRO, following

B. Definition of terms pursuant to Retirement Equity Act of 1984

29 [USC](#) 1056(d)(3)(B)(ii)

- 1) Domestic Relations Order. A “Domestic Relations Order” is a judgment, decree, or order (including approval of a property settlement agreement) which
 - a. Relates to provision of child support, alimony/maintenance payments, or marital property rights to a spouse, former spouse, child, or other dependent of a Participant, and
 - b. Is made pursuant to a state or tribal domestic relations law (including a community property law)

29 [USC](#) 1056(d)(3)(B)(i),
(C), (D)

- 2) Qualified Domestic Relations Order. A “Qualified Domestic Relations Order” is a Domestic Relations Order that
 - a. Creates or recognizes the existence of an Alternate Payee’s rights to, or assigns to an Alternate Payee the right to, receive all or a portion of the benefits payable with respect to a Participant under a Plan, and
 - b. Clearly specifies certain facts, and
 - c. Does not alter the amount or form of benefits under a Plan
 - d. Even though signed by the Ct, a Domestic Relations Order becomes “Qualified” (i.e., approved) only after it is signed by the Plan Administrator

Comment

- 3) Participant. The “Participant” is the employee spouse
- 4) Alternate Payee. Pursuant to [IRC](#) § 414(p)(8), the “Alternate Payee” is a spouse, former spouse, child, or other dependent of a Participant who is recognized by a Domestic Relations Order as having a right to receive all, or a portion of, the retirement benefits payable under a Plan with respect to such Participant
- 5) Surviving Spouse. Pursuant to [IRC](#) § 414(p)(5), this is the spouse entitled to receive survivor benefits under [IRC](#) § 401(a)(11) and [IRC](#) § 417

Flag

If the former spouse (usually the Alternate Payee) is not specifically designated as the surviving spouse in the Order, no survivor benefits will be available for the former spouse

- 6) Earliest Retirement Age. Pursuant to [IRC](#) § 414(p)(4)(B), the “earliest retirement age” is the earlier of (a) date on which the Participant is entitled to a distribution under the plan, or (b) later of the date Participant turns 50 or earliest date on which Participant can begin receiving benefits under the plan if Participant separated from service

Hint

In selected cases, the Ct should know the earliest retirement age of the Participant, because that is the date when the Alternate Payee may withdraw benefits, without penalty, even though the Participant remains employed

C. Factual recitals and provisions regarding creation (and/or) assignment of retirement benefits

1) The following facts are relevant pursuant to [IRC](#) § 414(p)(2)

- a. Name, last-known mailing address, date of birth, and Social Security number of the Participant and Alternate Payee
- b. Amount or percentage of Participant's benefits to be paid by Plan to Alternate Payee, or manner in which such amount or percentage is to be determined

Hint

- At trial, Ct may want to inquire what percentage or flat amount was intended for the Alternate Payee, and whether benefits accrued as of the time of trial, but funded after the trial, were intended for division

c. Number of payments or period to which this Order applies

d. Name of Plan to which this Order applies

Hint

- There should be one Order for each Plan

D. Covenants regarding non-alteration of benefits

1) Pursuant to [IRC](#) § 414(p)(3), the Order

- a. Should not require the Plan to provide any type or form of benefit, or any option not otherwise provided under the Plan, and
- b. Should not require the Plan to provide increased benefits (determined on the basis of actuarial value), and
- c. Should not require the payment of benefits to the Alternate Payee that are required to be paid to another Alternate Payee under another Order previously determined to be a Qualified Domestic Relations Order

E. Additional provisions regarding payment to be made to Alternate Payee before, on, or after Earliest Retirement Age or separation from service of participant, upon rollover of benefits into individual retirement account, or upon termination of plan

29 [USC](#) 1056(d)(3)(E)(i)
[IRC](#) § 414(p)(4)(A)

- 1) Based on 29 [USC](#) § 1056(d)(3)(E)(i) (ERISA § 206(d)(3)(E)(i)) and [IRC](#) § 414(p)(4)(A), in the case of any payment to the Alternate Payee before the Participant has separated from service, this Order shall not be treated as failing to meet the requirements above, solely because this Order requires that payment of benefits be made to the Alternate Payee

- a. On or after the date on which the Participant attains (or would have attained) the Earliest Retirement Age as defined in this Order [[IRC](#) § 414(p)(4)(A)(i)], and
 - b. As if the Participant had retired on the date on which such payments are to begin under this Order (but taking into account only the present value of the benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement) [[IRC](#) § 414(p)(4)(A)(ii)], and
 - c. In any form in which such benefits may be paid under the Plan to the Participant (other than in the form of a joint and survivor annuity with respect to the Alternate Payee and his or her subsequent spouse) [[IRC](#) § 414(p)(4)(A)(iii)]
- 2) If the Alternate Payee begins to receive retirement benefits pursuant to this Order, and the Participant subsequently retires with the subsidized early retirement benefits, the amount payable to the Alternate Payee (shall/shall not) be recomputed so that the Alternate Payee (also receives/does not receive) a share of the subsidized benefits)
 - 3) If, as and when the Alternate Payee becomes eligible to receive retirement benefits pursuant to this Order, the Participant may not delay the commencement of the benefits in any manner whatsoever

F. Death of Alternate Payee—provision for designation of beneficiary

The Alternate Payee may designate a beneficiary with respect to the retirement benefits created or assigned in this Order as follows: _____

G. Death of Participant and survivor benefits—provisions for treatment of former spouse of Participant as surviving spouse of Participant for purposes of qualified preretirement survivor annuity, qualified joint survivor annuity, and other survivor benefits

- 1) Pursuant to [IRC](#) § 414(p)(5), the former spouse of the Participant, namely _____, (shall/shall not) be treated as the surviving spouse of the Participant for purposes of [IRC](#) § 401(a)(11) and [IRC](#) § 417

Hint

See definition of “Surviving Spouse” at [Sec. 5.B.5](#)), *supra*. At trial, Ct may want to inquire whether survivor spouse status was considered or intended

- 2) Spousal consent by the Alternate Payee with respect to any Participant loans shall be handled pursuant to [IRC](#) § 417(a)(2) as follows: _____.

Flag

In a contested trial, this may be an appropriate area of judicial inquiry

H. Disability of participant

I. Intended tax treatment of distributions or payments

- 1) Alternate Payee shall include all of the taxable portion of the retirement benefits if, as and when received in the Alternate Payee's gross income. For purposes of [IRC](#) § 72 and [IRC](#) § 402(e)(1)(A), Alternate Payee shall be treated as distributee of any distribution or payment made to the Alternate Payee under this Order. The retirement benefits, when paid to the Alternate Payee, shall not be taxable income to Participant or a deduction on Participant's income tax return
- 2) For purposes of [IRC](#) § 402(e)(4)(D)(v), the balance to the credit of Participant shall not include any amount distributed, paid and/or payable to Alternate Payee under this Order
- 3) Payments to Alternate Payee before Participant attains age 59-1/2 (are/are not) subject to an additional income tax that would otherwise apply under certain circumstances if Participant had received those amounts

[IRC](#) § 402(e)(1)(B)

- 4) With respect to rollover of a distribution made under this Order, portion of distribution so transferred shall be treated as an eligible (tax-free) distribution as set forth in [IRC](#) § 402(c)

If any amount is paid or distributed to an Alternate Payee, [IRC](#) § 402(c) shall apply to such distribution in the same manner as if such Alternate Payee were the employee

- 5) In case of any distribution or payment made to Alternate Payee as provided in this Order, pursuant to [IRC](#) § 72(m)(10), Participant's investment in contract (together with other amounts treated as Participant's investment in Plan) shall be allocated pro rata, on basis of present value of distribution or payment to Alternate Payee and present value of all other benefits payable with respect to the Participant

J. Miscellaneous provisions

- 1) It is intended that this Order will qualify as a Qualified Domestic Relations Order under the Retirement Equity Act of 1984, Pub. L. No. 98-397, and this Order shall be administered and interpreted in conformity with that Act
- 2) If the Alternate Payee does not receive the retirement benefits as and when provided for in this Order, or if at any time after the benefits are paid they shall thereafter cease, and in either event, the benefits are paid to the Participant or to another third party on the Participant's direction, the Participant will make payments out of the Participant's separate income or assets equal in all respects to those payments provided for in this Order. The Participant shall continue to make those payments until the retirement benefits begin or resume. In addition, the Participant shall be obligated to satisfy all other provisions of this Order
- 3) The Ct retains jurisdiction to amend this Order, but only for the purpose of establishing or maintaining its qualification as a Qualified Domestic Relations Order under the Retirement Equity Act; provided that no such amendment shall require the Plan to provide any type or form of benefit, or any option, not otherwise provided under the Plan, and further provided that no such amendment or the right of the Ct to amend will invalidate this Order as "Qualified" under the Act
- 4) A (true/authenticated/certified) copy of this Order shall be served upon the Plan Administrator forthwith by counsel for the (Alternate Payee/Participant). The Order shall take effect immediately and remain in effect until further order of the Ct

- 5) The Ct further retains jurisdiction to supervise and enforce the payment of retirement benefits as provided in this Order

K. Determination as to qualification of Domestic Relations Order, notice to Participant and Alternate Payee, agreement to comply with Order and other relief

The Plan Administrator, and any successor, and any successor Plan of the same employer or any Plan of a successor employer, hereby states and agrees as follows:

- 1) The attached Order is a Qualified Domestic Relations Order under the Retirement Equity Act, and the Participant and Alternate Payee are hereby notified of its qualification; and
- 2) The Plan Administrator will comply fully with all of the terms and conditions of the Order, pursuant to 29 [USC](#) § 1056(d)(3) (ERISA § 206(d)(3)), and in accordance with the fiduciary standards set forth in the Retirement Equity Act and ERISA.

29 [USC](#) 1056(d)(3)

Dated this ____ day of _____, ____.

Plan Administrator –
Address:
Phone: ()

FA 12: ATTORNEY AND GUARDIAN AD LITEM FEES/EXPERT COSTS

1. Atty Fees

§ 767.241(1)

A. Authority

Holbrook v Holbrook

[103 Wis. 2d 327](#)

(Ct. App. 1981)

Anderson v Anderson

[72 Wis. 2d 631](#) (1976)

- 1) Ct may order either party to pay for other party's Atty fees

- a. Atty fees must be reasonable, AND

b. Ct must consider need of one spouse for contribution, AND

c. Ct must consider ability of other spouse to pay

Becker v Becker

[2014 WI App 76](#)

[355 Wis. 2d 529](#)

Wallen v Wallen

[139 Wis. 2d 217](#)

(Ct. App. 1987)

- Ct may consider earning capacity instead of ability IF other spouse found to be “shirking”

Doerr v Doerr

[189 Wis. 2d 112](#)

(Ct. App. 1994)

- Ct may consider nonmarital assets

§_767.471(5)(b)1.b.

Bernier v. Bernier

[2006 WI App 2](#)

[288 Wis. 2d 743](#)

2) Ct shall award reasonable Atty fees to moving party upon finding periods of physical placement unreasonably withheld by other party

Borreson v Yunto

[2006 WI App 63](#)

[292 Wis. 2d 231](#)

Documentation of fees need not be presented at hearing on merits

3) Overtrial

Ondrasek v Ondrasek

[126 Wis. 2d 469](#)

(Ct. App. 1985)

- When one party burdens other with extra and unnecessary Atty or GAL fees through “overtrial,” may be ordered to pay fees without regard to need/ability

Hottenroth v Hetsko

[2006 WI App 249](#)

[298 Wis. 2d 200](#)

- Includes unnecessarily prolonged hearing resulting from Atty’s questioning

Johnson v Johnson

[199 Wis. 2d 367](#)

(Ct. App. 1996)

- As long as opposing party has reasonable opportunity to respond, “overtrial” determination does not require formal notice or separate hearing

- Determination of reasonableness of fees still required

Rodak v Rodak

[150 Wis. 2d 624](#)

(Ct. App. 1989)

- c. When contribution order principally designed to make marital estate whole, Ct not required to make findings re: reasonableness, need, and ability to pay

[§_767.241\(2\)](#)

- 4) May include fees for services rendered before commencement of action or after entry of judgment

[§_767.225\(1\)\(d\)](#)

- 5) Ct may include Atty fees in temporary order for maintenance

[§_767.264\(2\)](#)

- 6) On dismissal, substitution, or withdrawal of Atty, or vacation of judgment, Ct shall grant separate judgment in favor of Atty for fees and disbursements to which Atty, in Ct's opinion, reasonably entitled

- a. Before, or in order for dismissal, substitution, or withdrawal of Atty, or vacation of judgment

[§_767.225\(1\)\(h\)](#)

Kohl v

DeWitt Ross & Stevens

(In re Atty Fees in

Kohl v Zeitlin)

[2005 WI App 196](#)

[281 Wis. 2d 289](#)

- During pendency of divorce, Ct may freeze certain assets upon motion

Committee Comment

- b. When [§_767.264\(2\)](#) applicable and client of Atty requesting separate judgment objects to amount of fees, Ct should hold hearing with opportunity for client to obtain representation and present case

Davis v Rahkonen

[112 Wis. 2d 385](#)

(Ct. App. 1983)

- 7) When party dies during pending action, Ct retains jurisdiction to award Atty fees before dismissing action

Stasey v Miller

[168 Wis. 2d 37](#) (1992)

- 8) Ct in divorce action does not have subject-matter jurisdiction to decide Atty fee dispute between Atty and client whom Atty continues to represent

- a. Requires separate civil action

B. Amount

Anderson v Anderson

[72 Wis. 2d 631](#) (1976)

- 1) Fees awarded must be reasonable

Hennen v Hennen

[53 Wis. 2d 600](#) (1972)

- 2) Consider

- a. Amount and character of services rendered

- b. Labor, trouble, and time involved
- c. Character and importance of litigation
- d. Amount of money or value of property affected
- e. Professional skills and experience required
- f. Standing of Atty in profession
- g. Pecuniary benefit derived from services

C. Findings and order

Corliss v Corliss

[107 Wis. 2d 338](#)

(Ct. App. 1982)

- 1) Based on facts established by parties at trial
- 2) Make specific findings regarding
 - a. Total fees
 - b. Reasonableness
 - c. Need and ability to pay
 - d. Extra and unnecessary fees incurred by overtrial

[§_767.241\(3\)](#)

- 3) May order amount paid directly to Atty

[§_767.77\(3\)](#)

- 4) May grant judgment in favor of Atty if party fails to pay as ordered or fails to give security

[§_767.54\(3\)](#)

[Ch 785](#)

Rand v Rand

[2010 WI App 98](#), ¶¶ 7–8

[327 Wis. 2d 778](#)

D. Atty fees on contempt

- 1) Ct may order 100% of fees paid for losing party without reduction for time spent on unsuccessful claims, if

- a. Winning party achieved substantial success, and,
- b. Unsuccessful claims were brought and pursued in good faith, and
- c. Claims arose out of a “common core of facts”

2) Make whole rule applies in family Ct actions

E. Atty fees on appeal

1) Ct can order Atty fees for appeal

Dean v Dean

[87 Wis. 2d 854](#) (1979)

Arneson v Arneson

[120 Wis. 2d 236](#)

(Ct. App. 1984)

Consider whether reasonable grounds for success exist, as well as reasonableness of fees, and need and ability to pay

Hengel v Hengel

[120 Wis. 2d 522](#)

(Ct. App. 1984)

2) Trial Ct divested of jurisdiction to order Atty fees while case on appeal

F. State or Cty involvement

[§_767.241\(1\)\(b\)](#)

1) Ct may order other party to pay fees when State or Cty provides services to one party under

a. [Sec. 49.22](#) paternity and support enforcement program

- Fees set under [§_49.22\(6\)](#)

b. [Sec. 49.19](#) when rights to child support or maintenance have been assigned to State or Cty

[§_767.241\(3\)](#)

2) May order amount paid directly to State or Cty

[§_767.241\(4\)](#)

3) May not order payment of costs or fees by State or Cty that is party to action

2. Guardian ad Litem Fees

[§_767.407\(6\)](#)

A. Ct may direct either or both parties to pay

- 1) When one party burdens other with extra and unnecessary Atty or GAL fees through “overtial,” may be ordered to pay fees without regard to need/ability

Hottenroth v Hetsko

[2006 WI App 249](#),

¶¶ 51–55,

[298 Wis. 2d 200](#)

Overtial includes unnecessarily prolonged hearing resulting from Atty’s questioning

§_767.407(6)

B. If parties unable to pay, Ct may direct payment, in whole or in part, by Cty of venue

- 1) Parties may be directed to reimburse Cty in whole or part
- 2) Ct may order separate judgment for amount of reimbursement in favor of Cty and against party or parties responsible for reimbursement
- 3) If Cty ordered to pay GAL, amount ordered may not exceed compensation paid to private Attys under §_977.08(4m)

St ex rel Friedrich

v Circuit Ct

[192 Wis. 2d 1](#) (1995)

- 4) Ct can order Cty to exceed pay rate under §_977.08(4m) but only after making a record that Ct is unable to obtain qualified appointed counsel at statutory rate

C. Ct must approve amount of fees, both as to reasonableness and necessity

§_767.264(2)

D. On dismissal, substitution, or withdrawal of Atty, or vacation of judgment

- 1) Ct shall grant separate judgment for GAL for amount of fees and disbursements to which, in Ct’s opinion, GAL entitled
- 2) Ct may grant judgment before, or in order for dismissal, substitution, or withdrawal, or vacation

§_767.407(6)

E. Ct may enforce orders by means of contempt power

§_767.471(5)(b)1.b.

Bernier v Bernier

[2006 WI App 2](#)

[288 Wis. 2d 743](#)

Ct shall order all GAL fees to be paid by party who unreasonably withholds periods of physical placement

3. Costs of Experts

§_767.241(1)

A. May order either party to pay reasonable amount for cost to other party of maintaining or responding to action

Rohm v Rohm

[7 Wis. 2d 431](#) (1959)

1) Includes accountant's and appraiser's fees

Ct's decision should reflect considerations weighed and logical conclusion of weighing

§_767.407(6)

2) Includes fees for experts used by GAL to assist him or her in performing duties

Ct must approve fees both as to reasonableness and necessity

FA 13: CUSTODY AND PHYSICAL PLACEMENT

1. Jurisdiction

§_767.41(1)(b)

A. Ct shall determine legal custody and physical placement of any minor child of the parties in the following actions

1) Divorce

2) Annulment

3) Legal separation

4) Paternity

§_767.001(1)(e)

5) Custody

§_767.501(4)

6) To compel support

§_767.804(2)

7) For custody or physical placement when conclusive paternity determination based on genetic test results

§_767.805(3)(a)

8) For custody or physical placement when paternity acknowledged

B. Subject-matter jurisdiction

§_767.01(2m)

- 1) Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) governs all cases involving child custody when Cts in more than one state may have jurisdiction

§_822.21

- 2) Ct has jurisdiction to make initial determination or modification when
 - a. Wis is child's "home state" at time proceedings commenced, or
 - b. Child and parent or custodian have significant connection with Wis, or
 - c. All Cts of states otherwise having jurisdiction have declined on ground that Wis Ct is more appropriate forum to determine custody
 - d. No Ct of any other state would have jurisdiction
 - e. See **Jurisdictional Conflicts**, [FA 15](#)

§_822.24

- 3) Temporary emergency jurisdiction may be permitted if child is present in Wis and has been abandoned or needs emergency protection

25 [USC](#) 1911

§_48.028(3)

- 4) If child is partly Indian, and custody may be awarded to non-Indian parent, provisions of Indian Child Welfare Act apply
 - a. Child domiciled or living on reservation, tribal Ct may exercise jurisdiction
 - b. Child off reservation, tribal Ct may have jurisdiction, or tribe may have right to intervene in State Ct action
 - c. See **ICWA** in Juv Benchbook, [JV 17](#), for full discussion of ICWA

*David S v Laura S**(Int of Brandon SS)*[179 Wis. 2d 114](#) (1993)

- 5) [Ch](#) 822 does not apply to intrastate custody disputes

C. Personal jurisdiction

§_767.41(1)(a)

§_801.05

- 1) Asserted in same manner as in other actions affecting the family, see **Contested Divorce**, [FA 2](#), or

§_767.41(1)(a)

§_822.06

- 2) Person is notified in accordance with provisions of UCCJEA, or

§_801.06

- 3) Person makes general appearance

D. Service or notice

§_801.11(1)

- 1) Responding party in Wis

- a. Service under [Ch](#) 801

- b. See **Contested Divorce**, [FA 2](#)

§_822.08

- 2) Responding party outside Wis

- a. In a manner reasonably calculated to give actual notice, or

- b. By publication if other means are not effective

§_822.25

- 3) Notice and opportunity to be heard must be given to all persons entitled to notice under Wis law as in child custody proceedings between Wis residents, any parent whose rights are not terminated, and any person who has physical custody of child

2. Commencement of Action

A. Parties

§_767.41(1)(a)

- 1) Parent

Randy AJ v Norma IJ

[2004 WI 41](#)

[270 Wis. 2d 384](#)

JJ v RJ

[162 Wis. 2d 420](#)

(Ct. App. 1991)

LH v DH

(Paternity of DLH)

[142 Wis. 2d 606](#)

(Ct. App. 1987)

- a. Biological father may be estopped from overcoming presumption of paternity in husband of mother of child, if
 - Biological father fails to assume responsibility for child's emotional and financial needs, and husband has assumed those responsibilities, AND

- Determination to adjudicate husband as father is in best interest of child

§_822.25(1)

2) Any person claiming right to notice under Wis law as in child custody proceedings between Wis residents

a. See **Visitation Rights**, [FA 14](#), for discussion

§_822.25(1)

3) Physical custodian of child

§_767.43

4) Grandparent, great-grandparent, stepparent, or person who has maintained a relationship similar to a parent-child relationship may initiate action for visitation

a. See **Visitation Rights**, [FA 14](#)

Cox v Williams

[177 Wis. 2d 433](#) (1993)

b. Not available if there is an intact family

§_822.25(1)

5) Ct shall order joinder of any person who claims right to notice under Wis law as in child custody proceedings between Wis residents, any parent whose parental rights have not been terminated, and any person having physical custody of the child

If person is outside Wis, service or notice required according to §_822.08

B. Petition

§_767.205(3)

If independent action, petition entitled “In re Custody of
...”

C. All other requirements for commencing action are same as in other actions affecting family

§_767.215

1) Contents of petition

§_822.29

See David S v Laura S

(Int of Brandon SS)

[179 Wis. 2d 114](#) (1993)

2) Affidavit of jurisdictional facts required by UCCJEA

§_767.215

3) Summons and response

§_767.217

4) Service on Child Support Agency (CSA)

- 5) See **Contested Divorce**, [FA 2](#), and **Jurisdictional Conflicts**, [FA 15](#), for details

3. Pretrial Matters

A. Parenting plan

[§_767.41\(1m\)](#)

- 1) Unless Ct orders otherwise, party seeking sole or joint legal custody or periods of physical placement shall file a parenting plan within 60 days after
 - a. Ct waives requirement to attend mediation, or
 - b. Mediator notifies Ct that no agreement has been reached
- 2) Except for cause shown, if one party's parenting plan not timely submitted, right to object to other party's parenting plan waived

[§_767.215\(1\)\(c\)](#)

- 3) Ct may designate standard form for parenting plan

[§_767.41\(1m\)](#)

- 4) Plan must provide information regarding
 - a. Legal custody or physical placement sought
 - b. Where parent lives and where parent intends to live during next 2 years
 - If there is evidence of interspousal battery or domestic abuse by other parent, need not give address or future addresses of residence
 - c. Where and what hours parent works
 - If there is evidence of interspousal battery or domestic abuse by other parent, need not give address or future addresses of workplace
 - d. With specific detail, what proposed variable costs are expected to be incurred by or on behalf of the child
 - e. Who will provide and who will pay for necessary child care when a parent cannot
 - f. Where child will go to school

- g. What doctor or health-care facility will provide medical care for child
- h. What the child's religious commitment will be, if any
- i. Who will make decisions regarding child's education, medical care, choice of child-care providers, and extracurricular activities
- j. How holidays will be divided
- k. What child's summer schedule will be
- l. Whether and how child will be able to contact other parent, and what electronic communication, if any, the parent is seeking
- m. Whether equipment for providing electronic communication is reasonably available to both parents
- n. How parent proposes to resolve disagreements regarding matters of joint decision making
- o. If there is evidence either parent engaged in interspousal battery or domestic abuse, how child will be transferred for exercise of physical placement

[§_767.407](#)

B. Appointment of GAL

1) Ct must appoint GAL when

a. Legal custody or physical placement contested

[§_767.407\(2\)](#)

[§_767.405\(12\)\(b\)](#)

- Appointment made after Ct notified of failure of mediation UNLESS, on motion of party or Ct's own motion, Ct determines earlier appointment necessary

Biel v Biel

[114 Wis. 2d 191](#)

(Ct. App. 1983)

— Appointment must be made even if neither party so requests

St v Freymiller

(*In re Support of CLF*)

[2007 WI App 6](#)

[298 Wis. 2d 333](#)

— Parties may not waive participation of GAL in hearing if custody or placement disputed

b. GAL appointment NOT required under [para. a.](#) above if ALL the following apply

- Legal custody or physical placement contested in action to modify legal custody or physical placement under [§_767.451](#) or [§_767.481](#)
- Modification sought would not substantially alter amount of time that parent may spend with child
- Ct determines either
 - Appointment of GAL will not assist in determination because facts or circumstances make likely determination clear, or
 - Party seeks appointment of GAL solely for tactical purpose, or for sole purpose of delay

[§_891.39](#)

c. Person asserts husband is not father of child born during marriage

[§_767.407\(1\)\(a\)1.](#)
Racine Family Ct
Comm'r v ME
(Paternity of SA)
[165 Wis. 2d 530](#)
 (Ct. App. 1991)

d. Ct has special concern for future welfare of children

[§_767.407\(1\)\(b\)](#)

2) Ct may appoint GAL

- a. In any action affecting the family if child's legal custody or physical placement stipulated to be with any person or agency other than parent, or
- b. If, at time of action, child in legal custody of, or physically placed with, any person or agency other than child's parent by prior order or by stipulation

de Montigny v
de Montigny
[70 Wis. 2d 131](#) (1975)

3) Ct must appoint in sufficient time to permit GAL to make full investigation, prepare for trial, consult with social services, and subpoena witnesses

Riemer v Riemer
[85 Wis. 2d 375](#)
 (Ct. App. 1978)

4) When children have conflicting interests, separate GALs required

Joshua K v Nancy K
[201 Wis. 2d 655](#)
 (Ct. App. 1996)

5) When GAL appointed, minor not entitled to intervene with independent counsel, even if GAL is opposed to minor's position

[§_767.407\(4\)](#)

6) GAL duties

NOTE: Two resources available to GALs include

The *Domestic Abuse Guidebook for Wisconsin Guardians ad Litem* (Mar. 2017), <https://www.wicourts.gov/publications/guides/docs/galguidebook.pdf>, and

The *GAL Practice Guidelines* (last updated in 2023), published by the State Bar of Wisconsin's Family Law Section. See *infra* [Sec. 10](#)

a. Role

Bahr v Galonski

[80 Wis. 2d 72](#) (1977)

- Active advocate for best interests of child regarding custody, support, and placement

Wiederholt v Fischer

[169 Wis. 2d 524](#) (1992)

b. GAL is advocate for best interests of minor child and does not represent child per se

- Advocating concept of best interests may require GAL to advocate a position contrary to child's wishes

Hollister v Hollister

[173 Wis. 2d 413](#)

(Ct. App. 1992)

c. GAL may not be called as witness and therefore may not be cross-examined

- Atty acting as GAL to be treated as any other Atty acting as advocate for party in proceeding

d. GAL's report to be considered on same basis as an Atty's trial brief

- Facts stated must be proved by competent evidence at trial and recommendation equivalent of Atty's final argument

[§ 767.407\(4\)](#)

de Montigny v

de Montigny

[70 Wis. 2d 131](#) (1975)

e. Has right and obligation to

- Interview clients
- Make appropriate investigation, including whether there is evidence that parent engaged in interspousal battery or domestic abuse, and report to Ct results of that part of investigation

- Call and cross-examine witnesses
- Consider factors under [§_767.41\(5\)\(am\)](#) (subject to [§_767.41\(5\)\(bm\)](#)) and custody studies under [§_767.405\(14\)](#)
- Review and comment to Ct on any mediation agreement and stipulation made under [§_767.405\(12\)](#) and on any parenting plan under [§_767.41\(1m\)](#)
- Unless child otherwise requests, communicate to Ct the wishes of child as to child's legal custody or physical placement

David S v Laura S
(*Int of Brandon SS*)
[179 Wis. 2d 114](#) (1993)

- Appear in other action in which child's interest affected, even in other Cty

Lawrence v Lawrence
[2004 WI App 170](#)
[276 Wis. 2d 403](#)

- Upon stipulation of parties with joint custody, GAL may be given impasse-breaking authority re: major decisions concerning children

AJN v WLD
(*Paternity of SRN*)
[167 Wis. 2d 315](#), 322 n.3
(Ct. App. 1992), *aff'd*,
[174 Wis. 2d 745](#) (1993)

f. GAL not party to action

de Montigny v
de Montigny
[70 Wis. 2d 131](#) (1975)

g. GAL governed by standards of professional conduct

- Includes ex parte conferences with Judge

h. Duties continue on appeal

[§_767.407\(4m\)](#)

7) Any time after 120 days after GAL appointed, party may request status hearing regarding actions taken and work performed by GAL

a. Additional status hearings may not be requested sooner than 120 days after previous status hearing

8) Payment of GAL

[§_767.407\(6\)](#)

a. Cty may be ordered to advance payment, subject to reimbursement from parties, if present inability of both parties to pay

- b. If Cty ordered to pay GAL, amount ordered may not exceed compensation paid to private Attys under [§_977.08\(4m\)](#)

St ex rel Friedrich
v Circuit Ct
[192 Wis. 2d 1](#) (1995)

- c. Ct can order Cty to exceed pay rate under [§_977.08\(4m\)](#) but only after making a record that Ct is unable to obtain qualified appointed counsel at statutory rate

[§_767.407\(6\)](#)

- d. If the parties can afford to pay GAL, Ct may set payment at any level Ct deems appropriate under circumstances

C. Role of behavioral scientists

Pfeifer v Pfeifer
[62 Wis. 2d 417](#) (1974)

- 1) Ct-initiated social service investigation is

- a. Clearly authorized
- b. Commended and recommended
- c. Not required

[§_804.10](#)

- 2) When mental or physical condition of party in issue, Ct may order party to submit to physical or mental examination

- a. Order made on motion for cause shown and upon notice to all parties
- b. Order shall specify time, place, manner, conditions and scope of exam, and by whom to be made

[§_767.41\(5\)\(am\)13.](#)

- 3) Ct shall consider reports of appropriate professionals if admitted into evidence when custody contested

- a. Admission of expert testimony governed by [Ch](#) 907

Fritschler v Fritschler
[60 Wis. 2d 283](#) (1973)

- b. Weight given to opinions within Ct's discretion

Peterson v Peterson
[126 Wis. 2d 264](#)
 (Ct. App. 1985)

- c. Ct not obliged to adopt even uncontradicted testimony if inherently improbable or evidence in case renders it against reasonable probabilities

Comment

- 4) At time of request for evaluation, obtain stipulation permitting report to be received with counsel reserving right to call and cross-examine writer and those who gave information

D. Educational programs and classes

§_767.401(1)(a)

- 1) Ct may order parties to attend program concerning effects on child of dissolution of marriage if appropriate and in best interest of child
 - a. If evidence that one or both of parties engaged in interspousal battery or domestic abuse, Ct may not require parties to attend program together or at same time

§_767.401(1)(c)

- b. Program must be educational and not therapeutic and may not exceed 4 hours

§_767.401(1)(e)

- 2) Party who fails to attend program may be ordered to pay costs of program or be proceeded against for contempt

§_767.401(2)

- 3) Ct may order parties to attend class addressing issues such as child development, family dynamics, how parental separation affects a child's development, and what parents can do to make raising a child in a separated situation less stressful for the child
- 4) Ct may not require parties to attend class as condition to granting final judgment or order in divorce or paternity action, BUT may refuse to hear custody or physical placement motion of party who refuses to attend class

E. Orders during pendency of action

§_767.225

- 1) During pendency of proceedings, Ct may make temporary orders
 - a. Granting legal custody of children to parties jointly, one party solely, or third party specified under §_767.41(3)
 - Ct may order sole legal custody without agreement of other party
 - b. Granting periods of physical placement to party specified in §_767.41(4)

§_767.225(1)(am)

- c. If Ct grants physical placement to one parent for less than 25% of the time, then Ct must enter specific findings of fact as to reasons that a greater allocation of physical placement with that parent is not in child's best interests
- d. Prohibiting relocation of children from Ct's jurisdiction

- 2) Orders must be "just and reasonable"

§_767.225(1n)

3) Must consider factors governing final judgments

4) Temporary orders and modifications may be based on stipulation of parties

[§_767.225\(1n\)](#)

[§_757.69\(8\)](#)

[§_767.17](#)

5) CCC temporary orders reviewable by Ct on motion of any party

a. Party may request new hearing

b. Party is required to be present at the hearing in order to seek a de novo review

c. Right to de novo review does not apply to stipulations entered into between the parties

d. Notices requesting de novo review will not stay the order unless the Trial Ct grants a stay

e. If a party seeks a de novo review, the party shall file a motion for hearing de novo within 20 calendar days of an oral decision or 20 calendar days of mailing a written decision by the CCC

f. Ct shall hold a hearing de novo no later than 60 days from the filing of the motion for de novo review

Jahimiak v Jahimiak

[2024 WI App 5](#)

[410 Wis. 2d 557](#)

But this timeline is directory, not mandatory

6) Temporary order has no binding effect on final custody determination

[§_48.355\(4g\)](#)

[§_938.355\(4g\)](#)

7) A Juv/children's Ct Judge may enter an order regarding custody and placement in a family Ct action. The order has the same effect as an order issued by the family Ct Judge. It remains the order until the family Ct Judge modifies or terminates the order

[§_767.407\(1\)\(e\)](#)

8) Ct may make temporary order before GAL appointed or before GAL has made recommendation, if in best interest of child

F. Stipulations

[§_767.333](#)

1) Judge-approved stipulated initial orders before judgment under [§_767.333](#)

a. Before obtaining a judgment of divorce, annulment, or legal separation, the parties may agree to final custody and physical placement issues

- b. If the parties reach agreement on one or more custody and placement issues, they shall file a stipulation with the Ct that specifies the agreed-upon terms
- c. If the Judge approves the stipulation, the Judge shall incorporate and enter the terms of the stipulation as the initial order of placement or legal custody unless the Judge finds the terms are not in the best interest of the child
- d. Before entering a stipulation as the final order, the Judge shall conduct a hearing on the record and comply with any requirements under [§_767.41](#)
- e. If the Judge finds a pattern or serious incident of interspousal battery or domestic abuse, the safety and well-being of the child and the safety of the parent who was the victim shall be of paramount concern in determining custody and placement
- f. A stipulation entered under [§_767.333](#) is effective and enforceable as the initial order regarding legal custody and physical placement
- g. [Sec. 767.333](#) requires stipulations under that statute to be approved by a Judge likely because the case remains contested until all issues are resolved; therefore, partial stipulations under [§_767.333](#) are not available for approval by a CCC pursuant to [§_757.69\(1\)\(p\)1.](#)

2) Ct-approved stipulations under [§_767.34](#)

[§_767.34](#)

Parties may stipulate as to custody and physical placement

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

- a. Not binding on Ct unless compliance with [§_767.333](#)
- b. Ct should make record establishing child's best interest and exercise independent judgment

[§_767.407\(1\)\(b\)](#)

- c. Ct may appoint GAL if custody or physical placement stipulated to be with any person or agency other than parent of the child

4. Mediation/Arbitration

A. Who may mediate

[§_767.405](#)

- 1) Cty must either

a. Establish a Family Ct services office to provide mediation services

- Director of Family Ct Services designated by circuit Judges for each Cty with approval of Chief Judge of administrative district
- Cty may designate supervisor of Office of FCC as Director

— Director to assign mediator

b. Or, contract with one or more public or private agencies in the Cty or a contiguous Cty to provide mediation services

§_767.405(4)

2) Cty-selected mediator must have

- a. Not less than 25 hours of mediation training or
- b. At least three years of professional experience in dispute resolution; and
- c. Training on dynamics of domestic violence and effects of domestic violence on victims of domestic violence and on children

§_767.405(7)

3) Private mediator may provide required services

- a. At parties' own expense
- b. Parties must sign and file written notice with Director of Family Ct Services and with Ct or CCC that private mediator to be used

B. What may be mediated

§_767.405(5)

- 1) Ct must refer parties to mediation in all actions affecting the family when legal custody or physical placement contested
- 2) Physical placement rights, visitation rights, or custody rights of persons claiming those rights are appropriate issues for mediation

§_767.405(9)

3) Mediator may NOT consider property division, maintenance, or child support unless

- a. These issues directly related to legal custody or physical placement issues being considered, AND

- b. Parties agree in writing to consider these issues

§_767.405(5)

C. When does mediation occur

- 1) In any action affecting the family when legal custody or physical placement contested
 - a. Includes revision of judgment or order under §_767.451 or §_767.59
 - b. Includes situations when both parties want joint legal custody but need assistance in resolving problem relating to joint legal custody and physical placement
 - Either party may seek referral from Ct
- 2) When modification of physical placement or custody sought or person having placement, visitation, or custody rights having problems
- 3) See ADR, [FA 3](#), this volume

D. Initial session of mediation

§_767.405(8)

- 1) Parties must attend initial session with mediator

§_814.615(1)(a)1.

- 2) No fee for initial session
- 3) Purpose is for screening and evaluation, including screening for domestic abuse, to determine whether mediation appropriate and whether both parties wish to continue in mediation

§_767.405(8)(d)

- 4) At least 10 days before initial mediation session, each party must submit proposed parenting plan containing required information under §_767.41(1m) to Director of Family Ct Services for Cty in which action is pending or to assigned mediator. Parties may exchange proposed parenting plans before initial mediation session

§_767.405(8)(c)

- 5) Mediator must discuss with parties information included in proposed parenting plans under §_767.41(1m)
- 6) Not required if Ct finds attending session will cause undue hardship, OR
- 7) Ct finds attending session would endanger a party's health or safety, considering whether
 - a. That party engaged in abuse of child

- b. That party engaged in interspousal battery or domestic abuse
- c. Either party has significant problem with alcohol or drug abuse
- d. There is any other relevant evidence

§_767.405(10)

E. Mediator powers and duties

- 1) Guided by best interest of child
- 2) May include Atty for any party or appointed GAL in sessions
- 3) May interview child of parties, with or without a party present
- 4) May require written disclosure of facts relating to issue addressed in mediation
- 5) May suspend mediation to enable a party to obtain
 - a. Appropriate Ct order
 - b. Appropriate therapy
- 6) May terminate mediation
 - a. If a party does not cooperate
 - b. If mediation not appropriate
 - c. If evidence that
 - A party engaged in abuse of the child
 - Interspousal battery or domestic abuse has occurred
 - Either party has significant problem with alcohol or drug abuse
 - A party's health or safety will be endangered if mediation not terminated

§_904.085

F. Confidentiality of mediation

- 1) Communications made during mediation are protected as confidential, inadmissible communications
- 2) Communications not confidential if
 - a. Both parties consent to waive inadmissibility under §_904.085, or
 - b. Mediator reports (unborn) child abuse under §_48.981

§_767.405(14)(c)

- 3) Mediator may not investigate parties in subsequent legal custody or physical placement study unless each party personally consents
 - a. Ct or CCC must inform parties that no confidentiality of communications in mediation will exist if mediator does legal custody or physical placement study
 - b. Before consenting to study, parties must receive notice from mediator that consent waives confidentiality under §_904.085

G. Successful outcome of mediation

§_767.405(12)

- 1) Agreement prepared in writing and submitted to Ct as stipulation for inclusion in Ct order
 - a. Must be reviewed by Atty, if any, for each party
 - Atty must certify review on agreement
 - b. Must be reviewed by GAL if one appointed
 - GAL must comment on agreement based on best interest of child

§_767.405(12)(a)

- c. Mediator must certify that written agreement accurately reflects agreement between parties
- 2) Ct may approve or reject agreement, based on best interest of child

Ct must state IN WRITING reasons for rejecting agreement

H. If mediation is unsuccessful

§_767.405(12)(b)

- 1) Parties or mediator must notify Ct of nonagreement

§_767.405(12)(b)

- 2) Ct must promptly appoint GAL under §_767.407

- a. After appointment, Ct shall, if appropriate, refer matter for legal custody or physical placement study

- If parties reach agreement, study terminated

§_767.407(1)(am)

- b. Ct not required to appoint GAL if there is a contested action to modify legal custody or physical placement

AND

Modification would not substantially alter time parent may spend with child

AND

Ct determines

- Appointment of GAL will not assist Ct because facts or circumstances make likely determination clear

OR

- Party seeks appointment of GAL solely for tactical purpose, or solely for delay, and not for a purpose in best interest of child

§_767.405(12)(b)

- 3) Parties may return to mediation before any trial or final hearing on legal custody or periods of physical placement

Biel v Biel

[114 Wis. 2d 191](#)

(Ct. App. 1983)

I. Ct may not order binding arbitration of custody issues

§_767.405(12)(b)

Custody must be judicial determination

5. Custody and Placement Study

§_767.405(14)

A. Counties must provide legal custody and physical placement study services

- 1) Study to be conducted by person or entity designated by Ct
- 2) Study to be initiated
 - a. Whenever legal custody or physical placement of minor child contested and mediation not used or does not result in agreement between parties, or
 - b. At any other time Ct considers it appropriate
- 3) Study to investigate
 - a. Conditions of child's home
 - b. Each party's performance of parental duties and responsibilities relating to the child
 - c. Whether either party has engaged in interspousal battery or domestic abuse
 - d. Any other matter relevant to best interest of child

§_767.405(14)(b)

B. Report of results of study must be submitted to Ct and parties at least 10 days before report is introduced into evidence

- 1) Ct may review report, but may not rely on it as evidence before it is properly introduced
- 2) Report to be part of record if it is offered and admitted in accord with rules of evidence

C. Mediator may not conduct study UNLESS

- 1) Each party personally so consents by written stipulation

After receiving notice from person who provided mediation that consent waives privilege of confidentiality attached to mediation

6. Hearing

A. Procedure

§_767.235(1), §_822.07

- 1) Custody hearings must receive priority in scheduling

[§_767.235](#)

2) Hearing before Ct

- a. Appearances and trial procedures as in all actions affecting family
- b. See **Contested Divorce**, [FA 2](#)

B. Initial determination of legal custody and periods of physical placement between parents

1) Criteria

[§_767.41\(2\)](#)

See also

Rosecky v Schissel

(In re Paternity of FTR)

[2013 WI 66](#)

[349 Wis. 2d 84](#)

- a. Best interest of child controls

[§_767.41\(2\)\(am\)](#)

- b. Ct shall presume joint legal custody in best interest of child

[§_767.41\(2\)\(d\)1.](#)

- c. BUT, if Ct finds that one party engaged in pattern or serious incident of interspousal battery or domestic abuse, then rebuttable presumption that it is detrimental to child and contrary to best interest to award joint or sole custody to that party, UNLESS

- Party successfully completed treatment for batterers and is not abusing alcohol/drugs, AND
- In best interest of child that batterer or abuser be awarded joint or sole legal custody based on other statutory factors

[§_767.41\(2\)\(d\)2.](#)

- d. If Ct finds BOTH parties engaged in pattern or serious incident of interspousal battery or domestic abuse, presumption against primary physical aggressor, as determined by consideration of ALL of the following:

- Prior acts of domestic violence between parties
- Relative severity of injuries, if any inflicted on party by the other in any prior acts of domestic violence
- Likelihood of future injury to either party resulting from acts of domestic violence
- Whether either party acted in self-defense in any prior acts of domestic violence
- Whether there is or has been pattern of coercive and abusive behavior between parties

- Any other facts Ct considers relevant

§_767.41(2)(d)3.

- e. If one party, but not both parties, convicted of crime that was act of domestic abuse to other party, Ct SHALL find party convicted of crime to be primary physical aggressor under [para. d.](#) above

§_767.41(2)(d)4.

- f. Presumption against joint or sole custody, *see* [para. c.](#) above, does not apply if both parties engaged in interspousal battery or domestic abuse, but Ct determines neither party was primary physical aggressor

§_767.41(5)

Goberville v Goberville

[2005 WI App 58](#)

[280 Wis. 2d 405](#)

2) Consider and articulate which of the following factors are relevant in determining best interests

a. Wishes of parent(s)

- May be shown by stipulation, proposed parenting plan, or legal custody or placement proposal

b. Wishes of child

- May be communicated by child or through GAL or other appropriate professional

c. Cooperation and communication between parties and whether either party unreasonably refuses to cooperate with other party

d. Whether each party can support other's relationship with child, including encouraging contact with child, or whether one party likely to unreasonably interfere with child's continuing relationship with other party

e. Interaction and interrelationship of child with siblings other significant persons

f. Interaction and interrelationship of child with parents and amount and quality of time each parent spent with child in past, any necessary changes to parents' custodial roles, and any reasonable lifestyle changes parent proposes to make to be able to maximize placement with child

g. Whether party, person with whom child's parent has a dating relationship, or person who resides (or has resided or will reside regularly or intermittently) in a proposed custodial household has or had a significant problem with alcohol or drug abuse

h. Child's adjustment to home, school, religion, and community

Gould v Gould

[116 Wis. 2d 493](#) (1984)

- Parent's choice of religion not valid criterion unless religious beliefs might be dangerous to child's health or morals
- i. Age of child and child's developmental and educational needs at different ages
 - j. Whether mental or physical health of party, minor child, or others living in proposed custodial household negatively affect child's intellectual, physical, or emotional well-being

§_767.41(5)(am)11.

- k. Whether party, person with whom parent of child has a dating relationship, or person who resides (or has resided, or will reside regularly or intermittently) in a proposed custodial household has a criminal record or has engaged in abuse of the child or any other child or neglected the child or any other child
- l. Whether there is evidence of interspousal battery or domestic abuse
- m. Reports of appropriate professionals if admitted into evidence

§_767.41(5)(bm)

- n. If Ct finds parent engaged in pattern or serious incident of interspousal battery or domestic abuse, safety and well-being of child and safety of other parent shall be paramount concerns in determining legal custody and periods of physical placement

3) Prohibited criteria

§_767.41(5)

- a. Preference on basis of sex or race

Schwantes v Schwantes

[121 Wis. 2d 607](#)

(Ct. App. 1984)

- b. Extramarital relationships or moral-social values

- Unless the relationship or values have an adverse effect on child

Gould v Gould

[116 Wis. 2d 493](#) (1984)

- c. Choice of religion or moral-social values

- Unless beliefs might be dangerous to child's health or morals

§_767.41(5)(c)

[Ch 324](#)

- d. Whether parent, if service member, has been or may be called to active duty in U.S. armed forces and consequently is, will be, or may be, absent from home. *See* [Sec. 9.K.](#), *infra*

- 4) Ct may not make a custody award contingent on occurrence of an event or on a prospective finding unless it complies with §_767.41(5m). *See* [Sec. 9.A.3.](#), *infra*. *But see Koeller v Koeller*, [195 Wis. 2d 660](#) (Ct. App. 1995)

Pfeifer v Pfeifer
[62 Wis. 2d 417](#) (1974)

- 5) Award of custody in temporary order, pending trial, not controlling

Kuesel v Kuesel
[74 Wis. 2d 636](#) (1976)

- a. Ct to consider custody question de novo
- b. Can consider record at temporary hearing, if relevant

C. Criteria for transfer of legal custody to third party

[§_767.41\(3\)](#)

- 1) May transfer custody to third party, if
 - a. Interest of child demands it, AND
 - b. Neither parent able to adequately care for child, OR
 - c. Neither parent fit and proper to have child's care and custody, OR

Barstad v Frazier
[118 Wis. 2d 549](#) (1984)

- d. Compelling reasons exist to transfer custody
 - Abandonment or extended disruption of parental custody
 - Persistent neglect of parental responsibilities
 - Similar extraordinary circumstances drastically affecting welfare of child

[§_767.41\(3\)](#)

- 2) If criteria for transfer to third party are met and child's best interests require, may
 - a. Declare child in need of protection or services, and
 - b. Transfer custody to third party
 - If Ct transfers custody to agency, Ct must also refer matter to Ct intake worker, who must conduct inquiry under [§_48.24](#) to determine whether to file CHIPS petition

[§_767.41\(3\)\(am\)](#)

- 3) If Ct transfers legal custody under [§_767.41\(3\)](#),

- a. Order transferring custody must include findings that
 - Placement in child's home would be contrary to child's welfare, and
 - Reasonable efforts have been made to prevent removal from home, while assuring that child's health and safety are paramount concerns, unless any aggravated circumstances in [§_48.355\(2d\)\(b\)1.–5.](#) apply
- b. If legal custodian appointed under [§_767.41\(3\)\(a\)](#) is Cty Dept, Ct must order child into placement and care responsibility as required under 42 [USC §_672\(a\)\(2\)](#) and must assign Cty Dept primary responsibility for providing services to child
- c. Ct must make [§_767.41\(3\)\(am\)](#) findings on case-by-case basis, and Ct order must document specific information on which findings are based

Barstad v Frazier
[118 Wis. 2d 549](#) (1984)

- 4) Best interest of child NOT the proper standard in custody dispute between parent and nonagency third party

7. Judgment

A. Legal custody options

[§_767.41\(2\)\(am\)](#)

- 1) Joint legal custody to both parties presumed to be in best interest of child. *But see* [Sec. 6.B.1\)c.–f.](#) above

[§_767.41\(2\)\(b\)](#)

- 2) Sole legal custody to one party, IF, based on best interest of child after consideration of factors in [§_767.41\(5\)](#)

- a. Parties agree to sole legal custody, OR
- b. Parties do not agree to sole legal custody but one party so requests and Ct specifically finds ANY of the following
 - One party not capable of performing parental duties and responsibilities OR does not wish to have active role in raising child, OR
 - One or more conditions exist that would substantially interfere with exercise of joint legal custody, OR
 - Parties will not be able to cooperate in future decision making required under joint legal custody. In making this finding Ct shall consider

— Any reasons offered by party objecting to joint legal custody

— Any other pertinent items

— Evidence that either party engaged in abuse of child, interspousal battery, or domestic abuse creates rebuttable presumption parties not able to cooperate

[§_767.41\(2\)\(c\)](#)

- c. Ct may not give sole legal custody to parent who refuses to cooperate with other if Ct finds refusal unreasonable

[§_767.41\(3\)](#)

3) Legal custody to third party

- a. Relative as defined by [§_48.02\(15\)](#), including

- Grandparent
- Stepparent
- Brother or sister
- First cousin
- Nephew or niece
- Uncle or aunt

Note: Relationships may be by blood, marriage, or adoption.

Note: For purposes of ICWA, relatives include extended family members, *see* [§_48.028\(2\)\(am\)](#), whether by blood, marriage, or adoption, including adoption under tribal law or custom.

- b. Cty social services

- c. Licensed child welfare agency

- d. DCF, if in Milwaukee Cty

- 4) Ct may not make a custody award contingent on occurrence of an event or on a prospective finding unless it complies with [§_767.41\(5m\)](#). *See* [Sec. 9.A.3](#), *infra*. *But see Koeller v Koeller*, [195 Wis. 2d 660](#) (Ct. App. 1995)

B. Legal custody to third party

- 1) Ct must notify parents of applicable grounds for TPR

§_767.41(3)(b)

- 2) Agency must report to Ct on status of child once each year

- a. No less than 30 days before anniversary of date of order

- b. May file additional reports

- c. Report to summarize child's permanency plan

- 3) Ct may not make a custody award contingent on occurrence of an event or on a prospective finding unless it complies with §_767.41(5m). See [Sec. 9.A.3](#)), *infra*. But see *Koeller v Koeller*, [195 Wis. 2d 660](#) (Ct. App. 1995)

§_767.41(3)(c)

- 4) Ct to hold hearing on agency permanency plan within 30 days after receiving annual report

- a. Ct to give at least 10 days' notice of time, place, and purpose of hearing to

- Child
- Parents, guardian, and legal custodian
- Child's foster parent, operator of facility where child living, or relative with whom child is living

§_767.41(3)(d)

- b. Following hearing, Ct to make all determinations specified under §_48.38(5)(c)

- Ct may amend order to transfer legal custody of child to another relative (not parent) or to another agency

C. Physical placement when sole or joint legal custody awarded to parent

§_767.41(4)

- 1) Ct to allocate periods of physical placement

- 2) Ct to consider each case on basis of factors in §_767.41(5)

- 3) Placement schedule shall allow child to have regularly occurring, meaningful periods of physical placement with each parent that maximize time child spends with each parent, taking into account geographic separation and accommodations for different households

Keller v Keller
[2002 WI App 161](#)
[256 Wis. 2d 401](#)

- a. Statute does not establish presumption of equal placement

Lofthus v Lofthus
[2004 WI App 65](#)
[270 Wis. 2d 515](#)

Arnold v Arnold
[2004 WI App 62](#)
[270 Wis. 2d 705](#)

- b. No absolute fundamental right to equal placement

4) Child entitled to periods of physical placement with both parents

- a. UNLESS, after a hearing, Ct finds physical placement with a parent would endanger child's physical, mental, or emotional health

Wolfe v Wolfe
[2000 WI App 93](#)
[234 Wis. 2d 449](#)

- b. Burden of proof on parent seeking to deny contact with other parent

5) Ct may not deny parent periods of physical placement for failure to meet financial obligation to child or former spouse

6) If Ct denies parent periods of physical placement, must give TPR warning

7) If Ct grants periods of physical placement to both parents

[§_767.481\(1\)](#), as repealed
 and recreated by 2017
 Wis Act 203

- a. Parent who intends to relocate and reside with the child 100 or more miles from the other parent must file motion with Ct to seek permission for relocation

- b. See **Modification of Judgment**, [Sec. 9](#), for details

[§_767.41\(4\)\(c\)](#)

8) If Ct grants periods of physical placement to more than one parent, Ct may grant parent(s) reasonable amount of electronic communication at reasonable hours during other parent's periods of physical placement

[§_767.481\(6\)](#), as repealed
 and recreated by 2017
 Wis Act 203

9) Except as otherwise provided in order or judgment allocating physical placement, person with legal custody and physical placement rights must notify any other person with periods of physical placement before removing child from child's residence for period of 14 or more consecutive days

D. Contents of final order if legal custody or physical placement contested

§_767.41(6)

- 1) Ct must state in writing why findings are in best interest of child; *see* [Sec. 6.B.2](#)), *supra*
- 2) If joint legal custody and one parent requests, Ct to specify major decisions in addition to those under [§_767.001\(2m\)](#)
- 3) If joint legal custody, Ct may give one party sole power to make specified decisions
- 4) If joint legal custody, Ct may specify one parent as primary caretaker and one home as primary home
 - a. For purpose of determining eligibility for aid under [Ch 49](#)
 - b. For any other purpose Ct considers appropriate

§_767.41(6)(a)

- 5) If Ct grants physical placement to one parent for less than 25% of the time, then Ct must enter specific findings of fact as to reasons that greater allocation with physical placement with that parent is not in child's best interests
- 6) In an order for physical placement, Ct to specify right of each party to physical control of child

In sufficient detail to enable party deprived of that control to implement any law providing relief for interference with custody or parental rights

§_767.41(8)

- 7) Judgment must include notification of contents of [§_948.31](#) (interference with custody)

§_767.41(6)(f)

- 8) If Ct finds party engaged in pattern or serious incident of interspousal battery or domestic abuse, Ct SHALL state in writing whether presumption against awarding custody to that party is rebutted and, if so, what evidence rebutted presumption and why findings relating to legal custody and physical placement are in best interest of child

§_767.41(6)(g)

- 9) If Ct finds party engaged in pattern or serious incident of interspousal battery or domestic abuse and Ct awards periods of physical placement to both, Ct shall provide for safety and well-being of child and for safety of other party. To do this, Ct, after considering availability of services or programs and to ability of party who committed battery or abuse to pay for them, SHALL impose one or more of following:
 - a. Require exchange of child in protective setting or in presence of appropriate third party who agrees by affidavit or other supporting evidence to assume responsibility and to be accountable to Ct regarding responsibility
 - b. Require periods of physical placement with party who committed battery or abuse to be supervised by appropriate third party who agrees by affidavit or other supporting evidence to assume responsibility and to be accountable to Ct regarding responsibility

- c. Require party who committed battery or abuse to pay costs of supervised physical placement
- d. Require party who committed battery or abuse to attend and complete, to Ct's satisfaction, treatment for batterers as condition of exercising periods of physical placement
- e. If party who committed battery or abuse has significant problem with alcohol or drug abuse, prohibit party from being under influence when parties exchange child for placement and from possessing or consuming alcohol or controlled substances during periods of physical placement
- f. Prohibit party who committed battery or abuse from having overnight physical placement
- g. Require party who committed battery or abuse to post bond for return and safety of child
- h. Impose any other condition Ct determines is necessary for safety and well-being of child or safety of other party

§_767.41(6)(h), as created
by 2017 Wis Act 203

- 10) In ordering legal custody and periods of physical placement, Ct must inform parents, and any other person granted legal custody of child, in writing that
 - a. Each parent must notify other parent, CSA, and Clerk of Ct of address at which they may be served within 10 business days after moving to that address;
 - b. Address provided to Ct is address on which other parties may rely for service of any motion relating to modification of legal custody or physical placement or to relocating child's residence; AND
 - c. Parent granted periods of physical placement must obtain Ct order before relocating with child 100 miles or more from other parent if other parent also has Ct-ordered periods of physical placement with child

E. Incidents of legal custody

§_767.001(2)
§_48.02(12)

- 1) Right and responsibility to
 - a. Make *major decisions* concerning the child as defined in §_767.001(2m)
 - b. Train and discipline child
 - c. Provide food, shelter, education, ordinary medical and dental care, and legal services
 - d. Protect child

§_48.023

- e. Authorize necessary medical, surgical, hospital, dental, institutional, or psychiatric care, unless another guardian is appointed
- f. Consent, or withhold consent, to marry, in accordance with §_765.02(2)

Wood v DeHahn

[214 Wis. 2d 221](#)

(Ct. App. 1997)

- g. Determine religious upbringing of child

F. Rights of noncustodial parents include

§_767.41(7)

- 1) Access to child's school records
- 2) Access to child's medical and dental records

G. Parent denied physical placement may be denied access to

§_51.30(5)(bm)

- 1) Child's Ct or mental health treatment records

§_118.125(2)(m)

- 2) Child's school records

§_55.23

- 3) Child's protective service records

§_146.835

- 4) Child's health-care records

H. Visitation or physical placement prohibited if parent kills other parent

§_767.44(1)

- 1) Ct may not grant parent visitation or physical placement if parent convicted of 1st-degree or 2nd-degree intentional homicide of other parent and conviction not reversed, set aside, or vacated

§_767.44(2)

- 2) BUT, [para. 1](#)) does not apply if Ct determines by clear and convincing evidence that visitation or periods of physical placement would be in best interest of child. Ct shall consider wishes of child in making determination

8. Enforcement of Orders

§_767.01

WWW v MCS

(Paternity of CAS)

[185 Wis. 2d 468](#)

(Ct. App. 1994)

A. Ct has authority to do all acts and things necessary and proper in action affecting the family to carry its orders and judgments into execution

[§_767.405\(5\)\(c\)](#)

B. Problems with custody or placement referred to CCC for investigation

CCC may refer to Family Ct Services for resolution

C. Criminal sanctions

[§_948.31\(3\)](#)

- 1) Class F felony if parent
 - a. Intentionally conceals child from child's other parent
 - b. Before issuance of temporary or final order determining custody rights, takes child with intent to deprive other parent of physical custody
 - c. After issuance of temporary or final order
 - Takes child from or causes child to leave other parent in violation of order, or
 - Withholds child more than 12 hours beyond Ct-ordered period of physical placement

[RMC Form FA-609](#)

[§_767.471](#)

D. Motion for enforcement

- 1) Motion must allege
 - a. Names of parties
 - b. Party awarded periods of physical placement
 - c. Parent denied period of physical placement by other parent, OR
 - d. Other parent substantially interfered with period of physical placement, OR
 - e. Parent incurred financial loss or expense as result of other parent's intentional failure to exercise placement, when order specifies specific times for placement
- 2) Must request one or more remedies as outlined in [paras. 8\)a.](#) and [b.](#), below

Ct may impose a remedy not requested in motion

- 3) Ct to accept any legible motion
- 4) Motion to be filed under principal action and is a motion for remedial sanction under [§_785.03\(1\)\(a\)](#)
- 5) Other party must be personally served with motion and may respond in writing before or at hearing or orally at hearing
- 6) Hearing shall be held within 30 days after service unless time extended by mutual agreement of parties or upon motion of GAL and approval of Ct
- 7) Ct may order appointment of GAL before hearing
- 8) If Ct finds intentional and unreasonable denial of period of physical placement OR intentional and unreasonable interference with period of physical placement

[RMC Form FA-611](#)

a. Ct SHALL

- Issue order granting replacement periods of physical placement

Borreson v Yunto

[2006 WI App 63](#)

[292 Wis. 2d 231](#)

- Award reasonable costs and Atty fees

Bernier v Bernier

[2006 WI App 2](#)

[288 Wis. 2d 743](#)

— Costs include reasonable GAL fees attributable to enforcement action

b. Ct MAY

- Specify times for exercise of periods of physical placement if not provided for in previous order or judgment AND/OR
- Find other party in contempt of Ct AND/OR
- Grant injunction requiring strict compliance with physical placement order, after considering whether alternative remedies requested would be effective AND/OR

- Injunction effective for period requested by party, but not more than 2 years
- If party requests, Ct shall order sheriff to assist in serving injunction
- Within 24 hours after request by party, Clerk of Ct shall send copy of injunction to law enforcement agency that has jurisdiction over other party's residence. If other party not resident of WI, send to sheriff in Ct's Cty
- Law enforcement agency shall make available to other law enforcement agencies, through a verification system, information on the existence and status of any injunction

§_767.471(8)

§_939.50(3)(i)

- Person who intentionally violates injunction subject to fine of not more than \$10,000, or imprisonment for not more than 3 years and six months, or both
 - Issue an order requiring party to pay financial loss or expense of other party as a result of intentional and unreasonable failure of party, without adequate notice, to exercise period of physical placement
- c. Except as provided in [paras. a.](#) and [b.](#), above, Ct may not modify order of legal custody or physical placement based on motion for enforcement

E. For additional enforcement remedies, see [FA 4](#) and [FA 5](#), this volume

[RMC Form FA-604A](#)

[RMC Form FA-604B](#)

9. Modification of Judgment

§_767.461

A. Parties may stipulate to modification of an order of physical placement or legal custody at any time

- 1) Ct shall incorporate terms of stipulation into a revised order

§_767.461

Racine Family Ct

Comm'r v ME

(Paternity of SA)

[165 Wis. 2d 530](#)

(Ct. App. 1991)

- a. Unless Ct finds that modification is not in best interest of child

Hint

- b. Check to see whether child support is consistent with new arrangement

§_767.407

- 2) If stipulation transfers legal custody or physical placement to third party or agency

§_767.407(1)(b)

Ct may appoint GAL

§_767.34(3)
§_767.41(5m)
§_767.461

- 3) Ct may approve a stipulation for legal custody and physical placement that includes modifications to legal custody or physical placement upon the occurrence of a specific future event that is reasonably certain to occur within 2 years after the stipulation. Ct may not approve a stipulation that includes modifications of legal custody and physical placement based on a party's anticipated behavior modifications

B. Procedure for seeking modification of custody/placement order

§_767.451(6)

- 1) Notice of petition, motion, or order to show cause requesting modification must be given to parents and any relative or agency having custody of child

§_767.281

- a. If petition, motion, or order to show cause is filed in Cty other than Cty in which judgment was rendered, moving party must send copy to Clerk of Ct in which judgment was rendered
- b. If question arises as to which Ct should exercise jurisdiction, a conference involving both Judges, all counsel, and GALs may be held

Stumpner v Cutting

[2010 WI App 65](#)

[324 Wis. 2d 820](#)

- c. Ct may not, sua sponte, modify physical placement

§_767.451(8)

- 2) Petition, motion, or order to show cause must include notification of availability of services offered by Office of FCC and by Family Ct Services

§_767.405(5)

- 3) If modification or termination of legal custody or physical placement rights contested, Ct or CCC must refer parties to mediation

See [Secs. 4.G.](#) and [4.H.](#), *supra*, for action after mediation

- 4) For use of referees in postjudgment proceedings for modification of custody and placement, see [FA 3 \(ADR\)](#), [Sec. 5](#)

§_767.451(1)(a)

C. Ct may not alter custody or physical placement order within 2 years after final judgment determining legal custody or physical placement, absent stipulation by parties, UNLESS

- 1) Party shows by substantial evidence that modification is necessary because current custodial conditions are physically or emotionally harmful to child
 - a. Applies to order of legal custody, and

- b. Applies to orders of physical placement if modification would substantially alter time parent to spend with child

Andrew JN v Wendy LD

(Paternity of

Stephanie RN)

[174 Wis. 2d 745](#) (1993)

- c. Custodial parent interference with periods of physical placement is not sufficient to change placement absent physical or emotional harm

Paul MJ v Dorene AG

(Paternity of

Bradford JB)

[181 Wis. 2d 304](#)

(Ct. App. 1993)

- d. Burden of proof is determined by effective date of order and not filing or hearing dates

[§ 767.451\(2\)](#)

2) Parties have substantially equal physical placement rights and

- a. It is impractical for parties to continue to have substantially equal physical placement

- Ct may modify if in best interest of child

[§ 767.451\(1\)\(b\)](#)

D. Ct may alter custody or physical placement order after 2 years have passed since initial order

- 1) If modification will substantially alter time a parent may spend with child, Ct must find all the following

- a. Modification is in best interest of child

- Rebuttable presumption that continuing current allocation of decision making under legal custody order is in best interest of child
 - Rebuttable presumption that continuing child's physical placement with parent with whom child resides for greater period of time is in best interest of child

[§ 767.451\(2\)\(b\)](#)

- If parents have substantially equal periods of physical placement, rebuttable presumption is that having substantially equal periods of physical placement is in best interest of child

- b. There has been a substantial change of circumstances since entry of last order affecting legal custody or substantially affecting physical placement

- 2) Change in economic circumstances or marital status alone of either party not sufficient to meet standards for modification

§_767.451(3)

- 3) If modification will not substantially alter amount of time parent may spend with child, Ct may modify order if it finds modification in best interest of child

Abbas v Palmersheim

(Paternity of

Nicholas BP)

[2004 WI App 126](#)

[275 Wis. 2d 311](#)

- 4) Presumption that joint custody is in best interest of child does not apply to modification

Landwehr v Landwehr

[2006 WI 64](#)

[291 Wis. 2d 49](#)

- 5) Ct not required to grant equal placement but is to set placement schedule in best interest of child considering all factors under §_767.41

Greene v Hahn

[2004 WI App 214](#)

[277 Wis. 2d 473](#)

- 6) In joint custody, Ct may modify decision-making authority in way that may result in change in amount of time child spends in home of parent having primary physical placement

§_767.451(4)

E. Ct may deny parent physical placement rights at any time if Ct finds those rights would endanger child's physical, mental, or emotional health

§_767.41(4)(cm)

Ct must give TPR warning to parent denied physical placement rights

F. Modification of periods of physical placement for failure to exercise physical placement

§_767.451(2m)

If Ct finds a parent has repeatedly and unreasonably failed to exercise periods of physical placement under order allocating specific times for the exercise of periods of physical placement, it may modify that order

G. Ct shall deny physical placement for killing other parent

§_767.451(4m)

- 1) Ct shall modify placement order to deny parent physical placement with child if parent convicted of 1st-degree or 2nd-degree intentional homicide of child's other parent and conviction not reversed, set aside, or vacated
- 2) BUT, [para. 1](#)) does not apply if Ct determines by clear and convincing evidence that physical placement would be in best interests of child. Ct shall consider wishes of child in making determination

§_767.451(5)

H. If either party opposes modification or termination of a custody/placement order, Ct must state reasons for decision in writing

§_767.451(5m)

- 1) In action to modify legal custody or physical placement, Ct shall consider the factors under §_767.41(5) and shall make its determination consistent with §_767.41

[§_767.451\(5m\)\(b\)](#)

- a. Ct shall consider whether stepparent of child has criminal record and whether there is evidence stepparent engaged in abuse of child or any other child or neglected child or any other child

[§_767.451\(5m\)\(c\)](#)

[Ch_324](#)

- b. In action to modify legal custody order, Ct may not consider whether party who is service member has been or may be called to active duty in U.S. armed forces and consequently is, will be, or may be absent from home

[§_767.451\(6m\)](#)

- 2) Ct may require party seeking modification to file a parenting plan under [§_767.41\(1m\)](#) before hearing

[§_767.481](#)

I. Relocating a child's residence when both parents have physical placement rights

2017 Wis Act 203

NOTE: [Sec. 767.481](#) was repealed and recreated by 2017 Wis Act 203. The act applies (1) to cases originally commenced on or after April 5, 2018, and (2) to cases “originally commenced before April 5, 2018, but in which a legal custody or physical placement order is modified on or after April 5, 2018.”

[§_767.481\(1\)\(a\)](#)

- 1) If one parent intends to relocate and reside with the child 100 miles or more from the other parent, that parent must file motion with Ct to seek permission for relocation

[§_767.481\(1\)\(b\)](#)

- 2) Motion requesting relocation must include the following:

- a. Relocation plan, including

- Date of proposed relocation
- Municipality and state of proposed new residence
- Reason for relocation
- Proposed new placement schedule, if applicable
- Proposed responsibility and allocation of costs for each parent for child's transportation between parties under proposed new placement schedule

- b. Request for change in legal custody, if applicable

- c. Notice to other parent that he or she must file and serve objection and alternate proposal at least 5 days before initial hearing

- d. “Objection to Relocation” form

[§_767.481\(1\)\(d\)](#)

3) If parents already live more than 100 miles apart, then parent who proposes to relocate and reside with child must serve written notice of intent on other parent at least 60 days before relocation. Notice must include the following:

- a. Date on which parent intends to relocate
- b. Parent's new address

[§_767.481\(2\)](#)

4) Initial hearing

- a. Initial hearing must be held within 30 days after parent files motion for relocation under [§_767.481\(1\)\(a\)](#)
- b. Child cannot be relocated pending initial hearing
- c. Ct must approve relocation plan proposed by parent filing motion

- IF Ct finds that parent not filing motion was properly served but (1) does not appear at hearing, or (2) appears at hearing but does not object
- UNLESS Ct finds that proposed relocation plan is not in child's best interest

d. If parent not filing motion appears at initial hearing and objects to relocation plan, Ct must

- Require objecting parent to respond in writing, within 5 business days, by stating basis for objection and proposals for new placement schedule and transportation responsibilities and costs if Ct grants relocation

— Objecting parent must file response with Ct and serve copy by mail on other parent at most recent address on file with Ct

— If parent filing response has actual knowledge that other parent has different address from address on file, response must be served by mail to both addresses

- Refer parties to mediation, unless Ct finds that attending mediation would cause undue hardship or endanger a party's health or safety
- Appoint GAL

— Except as provided in [§_767.407\(1\)\(am\)](#). See [Sec. 3.B.1\)b.](#), *supra*

— Appointment order must provide that, if mediator is ordered under [§_767.481\(2\)\(c\)2.](#), then GAL need not commence investigation on child's behalf unless mediator notifies Ct that parties are unable to reach agreement on issue

- Set matter for further hearing within 60 days

[§_767.481\(3\)](#)

5) Relocation pending final hearing

- a. Ct may temporarily allow parent to relocate with child, under [§_767.225\(1\)\(bm\)](#), if Ct finds that relocation is in child's best interest
- b. Ct must inform parties that relocation is subject to revision at final rehearing
- c. If CCC makes determination, order, or ruling regarding temporary relocation, either party may seek de novo review under [§_757.69\(8\)](#)

For de novo review procedures, see [Sec. 3.E.5](#)), *supra*

[§_767.481\(4\)](#)

6) Standards for deciding relocation motions

- a. If proposed relocation only minimally changes or affects the current placement schedule, if at all, then Ct must
 - Approve proposed relocation
 - Set new placement schedule, if appropriate
 - Allocate costs of and responsibility for child's transportation between parties under new placement schedule
- b. If proposed relocation more than minimally changes or affects current placement schedule, then Ct must use the following factors in determining whether to approve proposed relocation and new placement schedule:
 - Factors under [§_767.41\(5\)](#). See [Sec. 6.B.2](#)), *supra*
 - Presumption that Ct should approve plan of parent proposing relocation if Ct determines that objecting parent has not significantly exercised Ct-ordered placement
 - Presumption that Ct should approve relocation plan if Ct determines that parent's relocation is related to abuse of child, pattern or serious incident of interspousal battery, or pattern or serious incident of domestic abuse

- c. If objecting parent files responsive motion that seeks substantial change in physical placement or change in legal custody, Ct must use the following factors in ruling on motion:
 - Factors under [§ 767.41\(5\)](#). See [Sec. 6.B.2](#), *supra*
 - Presumption against transferring legal custody or child's residence to parent who Ct determines has significantly failed to exercise Ct-ordered physical placement
 - Presumption that Ct should approve relocation plan if Ct determines that parent's relocation is related to abuse of child, pattern or serious incident of interspousal battery, or pattern or serious incident of domestic abuse
- d. Ct must decide contested relocation motions and related motions for modification of legal custody or physical placement in the child's best interest
- e. If objecting parent files responsive motion that seeks substantial change in physical placement or change in legal custody, and parent proposing relocation withdraws or otherwise fails to pursue motion or Ct does not allow relocation, then Ct must proceed on objecting parent's motion under [§ 767.451](#). See [Sec. 9.C](#), *supra*

[§ 767.481\(5\)](#)

7) Stipulations

- a. At any time after relocation motion is filed under [§ 767.481\(1\)](#), if parties agree that one parent may relocate more than 100 miles away from the other parent, then parties may file stipulation with Ct that specifies that neither parent objects and that sets out any agreed-upon modification to legal custody or periods of physical placement, including responsibility and costs for child's transportation
- b. Ct must incorporate terms of stipulation into relocation order or revised order for custody or physical placement, unless Ct finds that modification is not in child's best interest

J. Ct may not order a modification of custody to happen contingent on occurrence of an event or on a prospective finding unless it complies with [§ 767.41\(5m\)](#). See [Sec. 9.A.3](#), *supra*. But see *Koeller v Koeller*, [195 Wis. 2d 660](#) (Ct. App. 1995)

[Ch 324](#)

Lubinski v Lubinski

[2008 WI App 151](#)

[314 Wis. 2d 395](#)

K. Generally, Ct may not transfer physical placement right of parent to third party chosen by parent. However, during a parent's deployment, a temporary delegation of custodial responsibilities can be made via a temporary agreement between the parents or a temporary Ct order following a hearing

[§ 48.355\(4g\)](#)

[§ 938.355\(4g\)](#)

- L. A Juv/children's Ct Judge may enter an order regarding custody and placement in a family Ct action. The order has the same effect as an order issued by the family Ct Judge. It remains the order until the family Ct Judge modifies or terminates the order**

10. GAL Practice Guidelines

The following pages reprint the introduction and outline of the *GAL Practice Guidelines* (updated in 2023) published by the State Bar of Wisconsin's Family Law Section. The *Guidelines* and accompanying sample forms for use by GALs are available on the State Bar's website, at <https://www.wisbar.org> (section members can navigate to the Family Law Section's "Section Member File Cabinet" after logging into the website).

GAL GUIDELINES INTRODUCTION:

GALs play a vital role in the family courts in Wisconsin. The GAL is responsible for advocating for the Best Interests of the Child, yet the Best Interests of the Child could easily be lost among the quest for fairness to the parents. The parents' faces and voices are in front of the court. The child's are not, other than through the picture painted by the parents and the attorneys. The GAL has the formidable task of not only representing the Best Interests of the Child, but of bringing the faceless child's voice into the courtroom through whatever evidence is available.

These guidelines are meant to assist GALs in accomplishing their representation of the Best Interests of the Child. The 2023 committee members are grateful to the Bench/Bar/Psychologist committee who revised these Guidelines in 2012 and the circuit court commissioners, family law attorneys, and psychologists who reviewed them, along with the committee of family lawyers who drafted the original Guidelines.

I. TRAINING AND EXPERIENCE

A. Statutory Requirements: Wis. Stat. § 767.407(3):

1. Must be an attorney admitted to practice in Wisconsin.
2. May not be an interested party to the action, counsel to any party to the action, or a relative or representative of an interested party to the action nor have any ethical conflict of interest. *Hollister v. Hollister*, 173 Wis.2d 413 (Ct. App. 1992) (a GAL may not be called as a witness nor communicate with the judge in any matter different from an attorney for any other party).

B. SCR Chapter 35 - Supreme Court Rule Requirements

1. Guardian ad Litem appointed on or before January 1, 2021:
 - a. Must have 6 hours of GAL education, approved under SCR 35.03, during the lawyer's current SCR 31.01(7) education reporting period, and in the prior education reporting period.
 - b. Exception. The appointing court has made findings in writing or orally on the record that there are exceptional circumstances that make the lawyer otherwise qualified to represent the best interests of the child in a proceeding.
 - c. At least 3 of the 6 GAL education credits in each reporting period must be in Family Court GAL Education under SCR 35.03(1m); approved by the Board of Bar Examiners.
2. Guardian ad Litem's first appointment after January 1, 2021:

a. Must have 9 hours of GAL education approved under SCR 35.03 during the lawyer's current 31.01(7) education reporting period, and in the education reporting period immediately prior. The 9 hours shall be allocated as follows:

- i. At least 3 of the 9 hours shall be approved education addressing the topic of family violence.
- ii. At least 3 of the 9 hours shall be approved as Family Court GAL Education as identified in SCR 35.03(1m)(a). These credits must be in addition to the 3 credits approved on the topic of family violence.
- iii. Remaining 3 hours may be any type of approved GAL or Family Court GAL Education.

b. Exception. The appointing court has made findings in writing or orally on the record that there are exceptional circumstances that make the lawyer otherwise qualified to represent the best interests of the child in a proceeding.

3. Guardian ad Litem's appointments after satisfying the initial 9 credit threshold for first appointment after January 1, 2021:

a. Must have 6 hours of GAL education approved under SCR 35.03 during the lawyer's current 31.01(7) reporting period and the education reporting period immediately prior. The 6 hours shall be allocated as follows:

- i. At least 1 of the 6 hours shall be approved education on the topic of family violence.
- ii. At least 2 of the 6 hours shall be Family Court GAL Education as identified in SCR 35.03(1m)(a). These must be in addition to the 1 credit approved on the topic of family violence.
- iii. Remaining hours may be any type of approved GAL or Family Court GAL Education.

b. Exception. The appointing court has made findings in writing or orally on the record that there are exceptional circumstances that make the lawyer otherwise qualified to represent the best interests of the child in a proceeding.

C. Local Rules and Procedures Requirements vary by county. It is the GAL's responsibility to know and meet the local requirements.

D. Acceptance of a GAL appointment is representation that the lawyer has met the above requirements. SCR 35.02.

E. The GAL must have adequate training and experience to fulfill the requirements set forth in the Judicial Council Note to Wis. Stat. § 767.407(4), that the GAL:

1. Advocate for the best interests of the child.
2. Function independently.
3. Function as the lawyer for the best interest of the child.
4. Consider the views of others including the child, social workers and other professionals involved in the case.

II. APPOINTMENT

A. Notice of Appointment. Upon acceptance of a GAL appointment, a GAL shall give prompt written notice to the parties or counsel, if any, of his/her appointment, including an explanation of the GAL's role and a copy of the order appointing GAL.

B. Terms/Fees. Unless the GAL is being paid a flat fee, upon appointment, the GAL shall give prompt written notice to the parties or any counsel of the requirements with regard to billing and payment. If the GAL is getting paid on an hourly basis, the GAL shall provide itemized monthly statements.

C. Communication with Represented Parties. A GAL shall obtain permission from an attorney representing a party before communicating with the party.

D. Practice Points:

1. If the parties are required to make a deposit toward the GAL fee, determine local practice regarding commencement of work.
2. The GAL may use non-identifying labels in the itemization to protect sources of information.
3. Some counties pay the GAL and then collect from the parents. If this is the practice in your county, the GAL should include this information in the original written notice of appointment.

III. INVESTIGATION

A. Contact with Parents.

1. Obtain the lawyer's consent for direct contact if a parent is represented.
2. Send a parent letter requesting autobiographical information as well as background regarding the children, marital history and parenting background. Parent questionnaires are also helpful.
3. Make reasonable efforts to meet with each parent as soon after accepting the appointment as possible. Meetings should be in-person if possible.
4. Practice points:
 - a. Use a lawyer letter that includes an assumption of consent and asks for background material the lawyer believes is relevant. Copies of pleadings can be obtained from the court electronic file.
 - b. Parent meetings are more effective if they occur after pleadings and initial information from parents are obtained.

B. Meeting with Child.

1. The GAL Should Meet the Child. A child is entitled to a voice not a choice. A meeting can serve many purposes. This interaction may be a question and answer interview, an observation session or a meeting with the child and another professional. Under Wis. Stat. § 767.405(4), unless the child otherwise requests, the GAL shall communicate to the court the wishes of the child regarding custody and placement.
2. The method in which the GAL interviews the child will vary from case to case. In some cases, a personal interview may not be helpful, such as with infants, very young children or a child with profound developmental disabilities.
3. Practice points:
 - a. The GAL should avoid interviewing the child, if possible, when the child has already been interviewed by a number of individuals (Ex. sexual or child abuse cases).
 - b. However, even in such instances, the GAL should "lay eyes" on an infant or toddler in order to humanize the representation.
 - c. In exercising discretion, the GAL should consider whether mental health professionals should be present during meetings with the child.

These might include a social worker, therapist or other mental health professional.

d. The GAL should carefully select a location for the interview in order to maintain the ability of the child to escape the stress of the family dispute and preserve the child's sense of respite or safety at places such as school or the office of a therapist. The GAL should weigh the potential impact of bringing the family conflict into that setting. Some children should be seen in a non-office setting.

e. Attorneys for parents may not interview a child who has a guardian ad litem without permission from the G.A.L. *In re Kinast*, 192 Wis.2d 36 (1995).

C. Home Visits. The GAL should balance the expense of a home visit versus potential usefulness and should include parents in the decision if appropriate. The GAL should consider possibly retaining a social worker to conduct the visits and provide a report, as a GAL cannot testify to what he or she saw.

Practice Points:

1. If the GAL does a home visit at each home before a formal meeting with the child, the child will be familiar with the GAL and, possibly, more willing to discuss the matter with the GAL.
2. The GAL may not be called as a witness by any party in a custody and placement proceeding.

D. Domestic Violence: The GAL shall investigate whether there is evidence of inter-spousal battery or domestic violence. Wis. Stat. § 767.405(4). The GAL shall report to the court on the results of the investigation. Under Wis. Stat. § 767.41(2)(d), there are rebuttable presumptions regarding custody if the court finds a party engaged in abuse or a pattern or serious incident of interspousal battery as defined in the statutes. The presumptions modify the best interest standard regarding custody under Wis. Stat. § 767.41(5).

Practice Point: The GAL should exercise due diligence in determining whether the presumptions in Wis. Stat. § 767.41(2)(d) apply to the case before making any recommendation to the court regarding custody and placement at temporary or final hearings.

IV. OTHER INVESTIGATIVE OPTIONS

A. Collateral Source Questionnaires.

1. Make sure to have different sets of questionnaires for different types of cases (divorce, paternity, post-judgment). Questionnaires can be sent to family, friends, neighbors, employers, coaches, previous spouses, significant others, etc., or in cases of suspected domestic abuse, other individuals/professionals who may have become involved with the family due to reported incidents or safety concerns for the children.
2. Obtain as much input as reasonably possible from a variety of sources.

B. School Teachers/Guidance Counselors/Daycare Providers.

1. Have the parents sign authorizations to speak with teachers, counselors, principals, and other appropriate school personnel, or daycare providers if the children are not yet of school age. If testimony is necessary but school personnel are unable to testify, consider other viable admissible evidence. Wis. Stat. §118.125; Wis. Stat. § 904.02.

C. Family or Individual Therapy.

1. If there is a history of therapy on the part of parents or children, this may be a good source of information. However, proceed with caution and consider the possibility that unwise disclosure might result in not only damage to the therapeutic relationship but could also jeopardize the safety of children or parents in cases of child and/or domestic abuse.

D. Health Care Providers.

1. Routine medical records are rarely useful and may be costly.
2. If a child has special health care issues, medical information can be extremely useful.
3. Be familiar with Physician/Mental Health Provider-Patient Privilege under Wis. Stat. § 905.04, *State v. S.H.* 150 Wis. 2d 730 (Ct. App. 1990)
4. You will need a release of information or court order to access medical records.

E. Law Enforcement.

1. Complete a CCAP review immediately upon accepting appointment as GAL. But note: Not all relevant information may be available on CCAP, including criminal records from other states or expungements, as well as confidential or sealed cases.

Practice Tip: If searching for restraining orders, note that some of these records are confidential and some or all of the information may not be on CCAP.

2. Investigate whether there is a history of child protective services involvement. Parents can complete an authorization for disclosure of Bureau of Child Welfare records pertaining to the minor children. Obtain the necessary release from the county child welfare department.

3. Unsubstantiated findings may not be determinative. The GAL must investigate all allegations of abuse and should weigh all the facts and allegations when making their recommendations.

F. AODA Assessments and Drug Screens: (when allegations are made, or misuse is suspected).

1. GAL must investigate the depth of the problem.

2. Check CCAP for any drug/alcohol-related offenses.

3. Home visits can be very revealing – as can in-person interviews/observations of the parents.

4. Appropriate drug screenings/tests can be accomplished by stipulation of the parties or by court order. The court will decide how to allocate costs.

5. Self-reported alcohol assessments may be a good starting point to investigate further.

G. Practice Points:

1. Avoid the appearance of bias by giving relatively equal attention to both parties' concerns and avoid unbalanced attention to one party's lawyer.

2. As a GAL, it may be appropriate to recommend therapeutic intervention for the child or family.

V. STATUTORY PROVISIONS: EDUCATIONAL PROGRAMS AND CLASSES, MEDIATION, CUSTODY AND PLACEMENT STUDIES

A. Wis. Stat. § 767.401: Educational programs and classes

1. In actions affecting the family that involve minor children the court may order the parties to attend an educational class, specified by the court, concerning the

effects of dissolution on children, parenting or coparenting skills, or both. See Wis. Stat. § 767.401(1). These programs must be educational rather than therapeutic and shall not be more than 4 hours in length. Wis. Stat. § 767.401(1)(c). Final judgment or order in the action may be conditioned upon completion of these courses. Wis. Stat. § 767.401(1)(d).

2. “During the pendency of a divorce or paternity action, the court may order the parties to attend a class that is approved by the court and that addresses such issues as child development, family dynamics, how parental separation affects a child’s development, and what parents can do to make raising a child in a separated situation less stressful for the child.” Wis. Stat. § 767.401(2).

3. Some counties require all parties (unless a waiver is granted) to attend a class under Wis. Stat. § 767.401(1) in all divorce actions that involve minor children. In counties where this is not required, or in the case of the classes set forth in Wis. Stat. § 767.401(2), the GAL may encourage parents to participate in said classes and may move the court to require parents to participate in said classes if, during investigation, the GAL believes that doing so would be in the child’s best interests.

B. Mediation.

1. The GAL may encourage the parents to participate in mediation or ask the Court to order mediation if, during the course of investigation, the GAL believes participation in mediation would assist in resolving issues in the best interests of the child. Mediation must be completed before a trial or final hearing unless waiver criteria are met. Wis. Stat. § 767.405(8)(b). Most counties require mediation prior to appointment of a GAL. GALs should assure the statutory requirements are met. See Wis. Stat. § 767.405.

2. The GAL must be a party to any settlement process affecting child-related issues. See Wis. Stat. § 767.407. The GAL must review and comment to the Court on any mediation agreement. See Wis. Stat. § 802.12(3).

3. Communications in mediation are inadmissible. Unlike privilege or confidentiality, this is not waivable. Though some mediators limit third party contacts by their mediation agreement and others refuse to communicate with the GAL or other attorneys, this statute does not prohibit such communication. See Wis. Stat. § 904.085.

4. With limited exceptions, a mediator may not be subpoenaed or otherwise compelled to reveal the communications in a mediation. See Wis. Stat. § 904.085(3)(b).

C. Custody and Placement Studies.

1. Counties are required to provide legal custody and physical placement study services by statute Wis. Stat. § 767.405(14).
2. Study services, or the lack thereof, vary widely county by county. If no staff or contract services are available, the GAL may petition the Court to appoint someone to conduct the study. [If you petition the court to appoint someone, you should identify an evaluator in advance].
3. The issue of cost should be considered when determining whether an independent custody study would be appropriate.
4. Wis. Stat. § 767.405(14)(b) requires that a report issued “shall be offered in accordance with the rules of evidence”. Wis. Stat. §. 767.405(14)(b)2. Said report shall be sent to the court and the parties at least 10 days before the report is introduced as evidence. “The court may review the report but may not rely upon it as evidence before it is properly introduced under subd. 2.” Wis. Stat. § 767.405(14)(b)(1).

D. Psychological and Other Expert Evaluations.

1. Upon a motion from the GAL which establishes the need for an expert witness to assist the GAL, the Court may order either or both parents (or the county if both parties are indigent) to pay for an expert witness shown to be necessary to assist the GAL. See Wis. Stat. § 767.407 (6).
2. Psychological evaluations should only be requested if the mental or emotional health affecting the capacity to parent is an issue. The scope of the evaluation must be specified in the order appointing the psychologist. The issue of cost must be considered as such evaluations are rarely covered by insurance.

VI. COURT APPEARANCES

- A. At each court appearance the GAL should advise the parties, counsel, if any, and the court of actions taken by him/her since the last court date.
- B. The GAL should, unless excused by the Court or agreed to by all parties, attend all hearings, whether temporary or final, which impact custody, placement, paternity, support, sharing of variable expenses or any other financial issue which affects the best interests of the child.

C. At each court appearance, the GAL shall act as “an advocate and legal representative to protect and advance the best interests of the children.” *Allen v. Allen*, 78 Wis.2d 263, 254 N.W.2d 244, 247 (1977). The GAL “possess all the rights, powers and obligations normally accorded to a legal advocate in trial setting.” *Id.*

D. A GAL should convey the wishes of the child per Wis. Stat. § 767.407(4).

E. A position advocated by a GAL at trial must be based on facts included in the record of a case or agreed to by the parties. Some Courts require a GAL submit a written report to the parties, counsel or the court. This should be considered a pretrial brief which will be based only upon facts to be introduced as evidence at trial. General observations that cannot be proven should not be included. Preliminary recommendations are always subject to modification based upon the evidence presented at trial.

F. All recommendations and positions of the GAL must include consideration of all statutory factors including, but not limited to, the impact of domestic violence. The GAL must investigate any history of domestic violence. Consider the history of injunctions, battery convictions, child abuse, disorderly conduct, felonies, misdemeanors, etc. Obtain police records where necessary. See Wis. Stat. § 767.407(4).

G. Final recommendations are the equivalent of final argument and must be supported by evidentiary facts or those stipulated to by the parties. See, *In re the Paternity of Stephanie R.*, 174 Wis.2d 745 (1993).

VII. ADVOCACY REGARDING BEST INTEREST

A. The GAL is an advocate for the best interest of the minor child as to some or all of the following: legal custody, physical placement, child support, tax exemptions, school attendance, therapy, day care, health care, transportation, extracurricular activities, insurance, and uninsured expenses. Many Courts do not want GAL input on financial issues such as child support and tax exemptions unless there may be a significant deviation from guidelines which could result in an issue relating to the best interests of the child.

B. Per Wis. Stat. § 767.407(4), the GAL shall function in the same manner as a lawyer for a party.

1. The GAL should file any appropriate motions on behalf of the best interest of the child, e.g., a motion for protective order to prevent the disclosure of a child's therapy records.

2. Typically the parties will cooperate with the GAL; however, occasionally formal discovery may be necessary in preparation for a contested hearing.

3. The GAL should obtain appropriate stipulations or interim orders, e.g., protective orders preventing a therapist being called as a witness.
4. The GAL cannot engage in ex parte communication with the court. *Hollister v. Hollister*, 173 Wis. 2d 413 (Ct. App. 1992).

C. Practice Points.

1. If a custodial dispute is litigated, the court will determine which parent will make the final decision with regard to the custodial issue. For example, the Court will not determine the best school for the child but will determine which parent should make educational decisions. Keep in mind there is a presumption of joint legal custody and review. Wis. Stat. § 767.41(2).
2. The GAL does not have to agree with the wishes of the child. It is the GAL's job to determine what type of placement and custody is in the child's best interest. The GAL does NOT represent the child. See *Wiederholt v. Fisher*, 169 Wis.2d 524 (Ct. App. 1992)(the GAL represents the concept of the best interest of the child).
4. Since the GAL does not represent a client, the GAL is not subject to discovery requests and is not required to turn over their file. The GAL should try to avoid being called as a witness because they are solely relying on incidents they witnessed. If doing a home visit, the GAL should always take a third party who will be able to testify about observations during that visit. GAL recommendations should always be based upon evidence that will be admissible in court.

VIII. TERMINATION OF APPOINTMENT: Wis. Stat. § 767.407(5)

A. Unless the court directs otherwise, the GAL appointment is terminated as follows:

1. Appointment is terminated when the final order is entered. "Final order" means the order that ends the custody/placement proceeding; or
2. In a case which an appeal is filed in which the GAL participates, the appointment terminates upon the conclusion of the appeal. The GAL may appeal a case just like any other litigant. If a party appeals the GAL may choose not to participate, but must file a statement of reasons for that decision with the appellate court. The court of appeals can order the GAL to participate.

B. Extension of the GAL Appointment.

1. Upon written request of the GAL, a party, or the person for whom the GAL is appointed or upon the court's motion, the court may extend the appointment beyond the entry of the final order or the termination of an appeal.
2. If the court extends the appointment or reappoints the GAL after the final order, the GAL should insure that the court specifically states the scope of the GAL's duties during the period of extension or reappointment.

C. Request to Terminate the GAL Appointment:

1. At any time, the GAL, any party, or the person for whom the appointment is made may request in writing that the court extend or terminate the appointment or reappointment.

D. Practice Points:

1. The GAL should send the parties a closing letter.
2. Allocation of GAL fees, including specific dollar amounts, any accrual of interest on unpaid fees, and time and manner of payment, should be clearly set forth in the final order or judgment.
3. Termination of an appointment or extension, if any, should be clearly set out in the final order.
4. There is no statutory or case law indication of the standard for what must be included in a request to terminate a GAL by a party or person for whom the appointment was made.

FA 14: VISITATION RIGHTS OF CERTAIN PERSONS

1. Grandparental Visitation

A. Visitation of marital children under [§.767.43](#)

Van Cleve v Hemminger

[141 Wis. 2d 543](#)

(Ct. App. 1987)

- 1) Grandparent has standing to petition
 - a. When there is an underlying action affecting family unit, which has previously been filed

AND

- b. When child's family is no longer intact and ordering visitation would be in child's best interest to help ease trauma of "dissolving family relationship"

Soergel v Soergel

[154 Wis. 2d 564](#) (1990)

- 2) Under §_767.43(1), an adoptive family constitutes an intact family unit. Thus, former biological grandparents have no standing under statute

§_767.43(1)

- 3) Petition may be granted

- a. Upon notice of hearing to parents of child, and

- b. Upon determination that visitation is in best interest of child

§_767.43(2)

- Whenever possible, Ct to consider wishes of child

CAVEAT

Michels v Lyons (In re Grandparental Visitation of AAL)

[2019 WI 57](#), [387 Wis 2d 1](#)

Roger DH v Virginia O (Paternity of Roger DH)

[2002 WI App 35](#)

[250 Wis. 2d 747](#)

- Ct must apply presumption that fit parent's decision regarding grandparental visitation is in best interest of child. To overcome the presumption, evidence must meet the clear and convincing evidence standard

SAM v Meister

[2016 WI 22](#)

[367 Wis. 2d 447](#)

- c. Under §_767.43(1), it is not required that a grandparent, greatgrandparent, or stepparent prove that he or she has maintained a relationship similar to a parent-child relationship

B. Visitation of nonmarital children under §_767.43

§_767.43(3), (3c)

- 1) Grandparent has standing to petition if

- a. Child is nonmarital child whose parents have not subsequently married each other

- b. Paternity has been determined under Wis law or another jurisdiction if grandparent filing petition is parent of child's father

§_767.43(4)

- Or if paternity of child not yet determined, person filing petition must, in conjunction with petition, file petition or motion under §_767.80(1)(k). Ct shall make determination as to paternity before determining visitation rights

- c. Child has not been adopted
- d. Grandparent has maintained relationship with child or has attempted to maintain relationship with child but has been prevented from doing so by parent who has legal custody

2) Applicable standard

§_767.43(3)

- a. Ct may grant reasonable visitation rights to grandparent if child's parents have notice of hearing, Ct determines that grandparent has met all standing requirements above, and
 - Grandparent not likely to act in manner contrary to decisions made by parent who has legal custody of child and that are related to child's physical, emotional, educational, or spiritual welfare
 - Visitation is in best interest of the child

CAVEAT

Michels v Lyons

(In re Grandparental

Visitation of AAL)

[2019 WI 57](#)

[387 Wis. 2d 1](#)

Roger DH v Virginia O

(Paternity of Roger DH)

[2002 WI App 35](#)

[250 Wis. 2d 747](#)

— Ct must apply presumption that fit parent's decision regarding grandparental visitation is in best interest of child. To overcome the presumption, evidence must meet the clear and convincing evidence standard

§_767.43(3c)

3) Procedure

- a. Grandparent may file a petition to commence independent action for visitation under [Ch 767](#) or may file a petition for visitation in underlying action affecting the family under [Ch 767](#) that affects child

§_767.43(3m)

- b. Pretrial hearing shall be held before Ct in action under [§_767.43\(3\)](#)
 - At hearing, parties may present and cross-examine witnesses and present other evidence relevant to determination of visitation rights
 - Verbatim record must be made
- c. On the basis of information produced at hearing, Ct shall evaluate probability of granting visitation rights to grandparent in a trial and shall so advise parties
 - On basis of evaluation, Ct may make appropriate recommendation for settlement to parties

[SCR](#) ch. 71

- d. If party or GAL refuses to accept recommendation, action shall be set for trial
- e. Hearing may be terminated and action set for trial if Ct finds it unlikely that all parties will accept recommendation under [§ 767.43\(3m\)](#)

[§ 48.9795\(12\)](#)

C. Visitation under [Ch 48](#)

- 1) Any grandparent may petition for visitation privileges with child
 - a. If one or both parents of child deceased and child in custody of surviving parent or any other person

HF v TF
(In re Grandparental
Visitation of CGF)
[168 Wis. 2d 62](#) (1992)

- Regardless of whether person with custody is married or whether child is adopted by stepparent

- 2) Ct may grant reasonable visitation privileges to grandparent
 - a. Ct must determine whether in best interest and welfare of child
 - b. Ct may modify privileges or orders on showing of good cause

CAVEAT
[§ 767.43\(3c\)](#)
Michels v Lyons
(In re Grandparental
Visitation of AAL)
[2019 WI 57](#)
[387 Wis. 2d 1](#)
Roger DH v Virginia O
(Paternity of Roger DH)
[2002 WI App 35](#)
[250 Wis. 2d 747](#)

- Ct must apply presumption that fit parent's decision regarding grandparental visitation is in best interest of child. To overcome the presumption, evidence must meet the clear and convincing evidence standard

2. Visitation by Other Persons

[§ 767.43\(1\)](#)

A. Who are other persons

- 1) Great-grandparent
- 2) Stepparent

Cox v Williams

[177 Wis. 2d 433](#) (1993)

- a. Former stepparent has no standing

SAM v Meister

[2016 WI 22](#)

[367 Wis. 2d 447](#)

- b. Under [§_767.43\(1\)](#), it is not required that a greatgrandparent or stepparent prove that he or she has maintained a relationship similar to a parent-child relationship

- 3) Person who has maintained relationship similar to a parent-child relationship with child

[§_48.9795\(12\)](#)

B. Stepparent visitation under [Ch 48](#)

- 1) Any stepparent may petition for visitation privileges with child

- a. If one or both parents of child deceased and child in custody of surviving parent or any other person

- Regardless of whether person with custody is married

- 2) Ct may grant reasonable visitation privileges to stepparent

- a. If in best interest and welfare of child

- b. Ct may modify privileges or orders on showing of good cause

CAVEAT

Troxel v Granville

[120 S. Ct. 2054](#) (2000)

- Ct must give special weight to parent's determination of appropriateness of visitation

C. Other persons have standing to petition

[§_767.43](#)

- 1) Under statute

Van Cleve v Hemminger

[141 Wis. 2d 543](#)

(Ct. App. 1987)

- a. When there is an underlying action affecting family unit, which has previously been filed

AND

- b. When child's family is no longer intact and ordering visitation would be in child's best interest to help ease trauma of "dissolving family relationship"

2) Under equity

Holtzman v Knott
(*Custody of HSH-K*)
[193 Wis. 2d 649](#) (1995)

a. Petitioner has a parent-like relationship with the child

- Parent consented to, and fostered, petitioner's formation and establishment of a parent-like relationship with the child
- Petitioner and child lived together in the same household
- Petitioner assumed obligations of parenthood by taking significant responsibility for child's care, education, and development, including contributing toward child's support, without expectation of financial compensation
- Petitioner has been in parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature

AND

b. Parent has interfered substantially with petitioner's parent-like relationship with the child

AND

c. Petitioner seeks Ct-ordered visitation within reasonable time after parent's interference

[§_767.43\(1\)](#)

3) Petition may be granted

a. Upon notice of hearing to parents of child, and

b. Upon determination visitation is in best interest of child

[§_767.43\(2\)](#)

- Whenever possible, Ct to consider wishes of child

CAVEAT
Michels v Lyons
(*In re Grandparental*
Visitation of AAL)
[2019 WI 57](#)
[387 Wis. 2d 1](#)
Roger DH v Virginia O
(*Paternity of Roger DH*)

[2002 WI App 35](#)
[250 Wis. 2d 747](#)

- Ct must apply presumption that fit parent's decision regarding visitation is in best interest of child. To overcome the presumption, evidence must meet the clear and convincing evidence standard

§_48.355(4g)

§_938.355(4g)

D. A Juv/children's Ct Judge may enter an order regarding visitation in a family Ct action. The order has the same effect as an order issued by the family Ct Judge. It remains the order until the family Ct judge modifies or terminates the order

3. Visitation Rights Affected by Homicide of Parent

§_767.43(1m)

§_48.9795(12)(cm)1.

A. Ct may not grant visitation rights to person convicted of 1st-degree intentional homicide or 2nd-degree intentional homicide of parent of child and conviction has not been reversed, set aside, or vacated

§_767.43(6)(a)

§_48.9795(12)(dm)1.

B. Ct shall deny existing visitation upon petition, motion, or order to show cause by parent or GAL, or upon Ct's own motion and upon notice to person granted visitation, if person convicted of 1st-degree intentional homicide or 2nd-degree intentional homicide of parent of child and conviction has not been reversed, set aside, or vacated

§_767.43(6)(b)

§_48.9795(12)(cm)2.,
(dm)2.

C. [Sections A.](#)

and [B.](#), *supra*, do not apply if Ct determines by clear and convincing evidence that visitation would be in best interests of child

1) Ct to consider wishes of child in making determination

4. Enforcement of Visitation Rights

§_767.43(5)

A. Visitation rights under §_767.43 may be enforced by contempt under [Chapter 785](#), except Ct may impose only [§_785.04\(1\)\(a\)](#) and (c) against contemnor

§_48.9795(12)(d)

B. Ct may issue necessary orders to enforce privileges under [§_48.9795\(12\)](#)

Matrix for Visitation Rights of Certain Persons
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Relationship	Standing	Standard	Restrictions
Grandparent (marital child) §_767.43(1), (2) ; <i>see</i> 1.A.	Must be previously filed action affecting family unit	Best interest of child—consider wishes of child, if possible	The following restrictions apply, in all instances when the right to visitation is afforded by statute:
Grandparent (nonmarital child) §_767.43(3) ; <i>Michels v. Lyons (In re Grandparental Visitation of AAL)</i> , 2019 WI 57 , 387 Wis. 2d 1 ; <i>see</i> 1.B.	1. Child is nonmarital and parents have not subsequently married each other. 2. For father's parents, paternity must be determined or action for paternity filed with request for visitation. 3. Child has not been adopted. 4. Grandparent has maintained or attempted to maintain relationship with child.	1. Best interest of child (no reference made to consideration of wishes of child) 2. Grandparent not likely to act in manner contrary to decisions made by parent who has legal custody of child and that are related to child's physical, emotional, educational, or spiritual welfare.	1. Ct must apply presumption that fit parent's decision regarding visitation is in the best interest of child. To overcome the presumption, evidence must meet the clear and convincing evidence standard. 2. Ct may not grant visitation rights to person convicted of 1st-degree intentional homicide or 2nd-degree intentional homicide of parent of child and conviction has not been reversed, set aside, or vacated. 3. Ct shall deny existing visitation upon petition, motion, or order to show cause by parent, GAL or upon Ct's own motion and upon notice to person granted visitation, if person convicted of 1st-degree intentional homicide or 2nd-degree intentional homicide of parent of child and conviction has not been reversed, set aside, or vacated.
Grandparent §_48.9795(12) ; <i>see</i> 1.C.	One or both of child's parents deceased	Best interest and welfare of child—consider wishes of child, if possible	NOTE: Paragraphs 2. and 3. do not apply if Ct determines by clear and convincing evidence that visitation would be in best interests of child; Ct to consider wishes of child in making determination.
Great-grandparent §_767.43(1), (2) ; <i>see</i> 2.A.1) & 2.C.	Must be previously filed action affecting family unit	Best interest of child—consider wishes of child, if possible	
Stepparent §_767.43(1), (2) ; <i>see</i> 2.A.2)	Must be previously filed action affecting family unit	Best interest of child—consider wishes of child, if possible	

Relationship	Standing	Standard	Restrictions
Stepparent §_48.9795(12) ; <i>see</i> 2.B.	One or both of child's parents deceased	Best interest and welfare of child—consider wishes of child, if possible	
Person who maintained relationship similar to parent-child §_767.43(1), (2) ; <i>see</i> 2.C.	Must be previously filed action affecting family unit	Best interest of child—consider wishes of child, if possible	
Person who maintained relationship similar to parent-child Under equity (<i>Holtzman v. Knott (Custody of HSH-K)</i> , 193 Wis. 2d 649 (1995)); <i>see</i> 2.C.	1. Petitioner has parent-like relationship with child; i.e. has been in parental role for length of time sufficient to establish with child bonded, dependent relationship, parental in nature. 2. Parent consented to and fostered formation and establishment of parent-like relationship with child. 3. Petitioner and child lived together in same household. 4. Petitioner assumed obligations of parenthood. 5. Parent has interfered substantially with petitioner's parent-like relationship with child. 6. Petitioner seeks Ct-ordered visitation within reasonable time after parent's interference.	Best interest of child (the ruling case does not make a specific reference to consideration of the wishes of child)	1. Only applies when petitioner has no statutory remedy. 2. Ct must apply presumption that fit parent's decision regarding visitation is in the best interest of child.

FA 15: JURISDICTIONAL CONFLICTS (UCCJEA/PKPA/HAGUE CONVENTION)

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA) PARENTAL KIDNAPPING PREVENTION ACT (PKPA) HAGUE CONVENTION

NOTE: As of May 2, 2024, Massachusetts is the only state not to have adopted the UCCJEA, see <https://uniformlaws.org>, although proposed bills to enact the UCCJEA are pending in the Massachusetts Legislature, see <https://malegislature.gov>.

1. General Provisions

A. Ct must make four separate determinations under UCCJEA and PKPA

§ 822.21, § 822.22

§ 822.23, § 822.24

1) Whether Ct has jurisdiction under UCCJEA

§ 822.02(4)

PC v CC

(In Interest of AEH)

[161 Wis. 2d 277](#) (1991)

Guardianship and TPR proceedings are custody proceedings governed by UCCJEA

28 [USC](#) 1738A(c), (f), (g)

§ 822.06, § 822.24

§ 822.43

2) Whether Ct should exercise jurisdiction under full faith and credit provisions of UCCJEA and PKPA

§ 822.27, § 822.28

3) Whether Ct should decline to exercise jurisdiction under UCCJEA by reason of petitioner's conduct or as inconvenient forum

28 [USC](#) 1738A(c)

4) Whether Ct's custody order, if entered, will be entitled to full faith and credit in other states under PKPA

§ 822.02(4)

B. Child custody proceeding includes:

1) Divorce

2) Legal separation

3) Neglect

4) Abuse

5) Dependency

6) Guardianship

7) Paternity

8) Termination of parental rights

9) Protection from domestic violence

§_822.02(4)

C. Child custody proceeding does not include:

1) Juvenile delinquency

2) Contractual emancipation

3) Enforcement of child custody order

§_822.03

4) Proceeding for authorization of emergency medical care for child

§_822.04

D. Application to Indian tribes

1) Act does not apply if child subject to ICWA

2) Ct must treat tribe as if it were a state

3) Child custody determination made by tribe in substantial conformity with UCCJEA shall be recognized and enforced by Ct

§_822.05

E. International application

1) Ct shall treat foreign country as if it were a state

2) Except as provided in [para. 3](#)), below, child custody determination in foreign country made in substantial conformity with UCCJEA shall be recognized and enforced by Ct

3) Ct need not apply UCCJEA if child custody law of foreign country violates fundamental principles of human rights

§_822.32

22 [USC](#) 9001–9011

4) Ct should also review applicability of Hague Convention on Civil Aspects of International Child Abduction

§_822.08

F. Notice to persons outside Wis

1) For Ct to exercise jurisdiction when person is outside Wis, notice may be given either:

a. In manner prescribed by Wis law for service of process, or

b. In manner prescribed by law of state in which service is made

2) Notice shall be given in manner reasonably calculated to give actual notice

a. May be by publication if other means not effective

§_822.07

G. Calendar priority

Question of existence of or exercise of jurisdiction under UCCJEA shall be given priority on calendar and handled expeditiously upon request of party

§_822.10

H. Communication between courts

1) Wis Ct may communicate with Ct in another state concerning proceeding under UCCJEA

a. Ct may allow parties to participate in communication

- If parties not able to participate, they shall be given opportunity to present facts and legal arguments before decision on jurisdiction made

b. Record shall be made of communication between Cts. Parties shall be informed promptly of communication and granted access to record. Except:

- Communication between Cts on schedules, calendars, Ct records, and similar matters may occur without informing parties, and record need not be made of communication

§_822.12

I. Cooperation between Cts

1) Wis Ct may request appropriate Ct of another state to do any of the following:

a. Hold an evidentiary hearing

b. Order person to produce or give evidence under procedures of that state

c. Order evaluation be made as to custody of child involved in pending proceeding

d. Forward to Wis Ct certified copy of transcript or record of hearing, evidence presented, and any evaluation prepared in compliance with the request

- e. Order party or any person having physical custody of child to appear in proceeding with or without child
- 2) Upon request of Ct of another state, Wis Ct may hold hearing or enter order described in [para. 1\)](#) above

2. Information to Be Submitted to Court in 1st Pleading or Affidavit

[§ 822.29\(1\)](#)

A. All parties must provide following sworn information in first pleading or attached affidavit

- 1) Child's present address or whereabouts and places where child lived during last 5 years
- 2) Names and present addresses of persons child lived with during last 5 years
- 3) Whether party has participated, as party, witness, or in any other capacity, in any other proceeding concerning custody, physical placement, or visitation

If so, identify Ct, case number, and date of custody determination, if any

- 4) Whether party knows of any current proceeding, including proceedings for enforcement or relating to domestic violence, protective orders, TPR, and adoptions

If so, identify Ct, case number, and nature of proceeding

- 5) Whether party knows of names and addresses of any person who has physical custody of child or claims rights of legal or physical custody or visitation, but who is not party to this litigation

If so, names and addresses of those persons

[§ 822.29\(2\)](#)

B. If information under [Sec. A.](#) above not furnished, Ct, upon motion of party or own motion, may stay proceeding until information furnished

C. Ct should review the affidavit to make sure Wis has jurisdiction to make an initial custody and placement determination

3. Subject-Matter Jurisdiction for Initial Determination

[§ 822.21\(1\)](#)

A. Wis Ct has subject-matter jurisdiction over initial determination only when one of following grounds is present

[§ 822.02\(7\)](#)

Gooch v Gooch

(*In re RJG*)

[107 Wis. 2d 704](#)

(Ct. App. 1982)

- 1) Wis is child's "home state"—where child lived with parent or person acting as parent for at least 6 consecutive months immediately before commencement of child custody proceeding

§ 822.21(1)(a)

- 2) Wis had been child's home state within 6 months before proceedings commenced, and

- a. Child absent from Wis, but

- b. Parent or person acting as parent continues to live in Wis

Stephen R v Ilana C

(*In re Gdnship of*

Alexis C)

[2011 WI App 13](#), ¶¶ 15–

26, [331 Wis. 2d 108](#)

- State of residence of person acting as parent only has jurisdiction under UCCJEA if that person is asserting legal custody rights to child

§ 822.21(1)(b)

- 3) Ct of another state does not have jurisdiction under [paras. 1\)](#) and [2\)](#), above, or Ct of home state has declined to exercise jurisdiction on ground that it is inconvenient forum or person requesting other Ct jurisdiction engaged in unjustifiable conduct and Wis more appropriate forum, and both of the following apply

- a. Child **and** at least one parent or person acting as a parent have significant connection with Wis, other than mere physical presence

Dragoo v Dragoo

[99 Wis. 2d 42](#)

(Ct. App. 1980)

- Summer visitation not connection significant enough to support jurisdiction, **and**

- b. Substantial evidence available here in Wis regarding child's care, protection, training, and personal relationships

§ 822.21(1)(c)

- 4) All Cts having jurisdiction under [paras. 1\)](#), [2\)](#), and [3\)](#), above, have declined jurisdiction on the ground they are inconvenient forums or person requesting other Ct jurisdiction engaged in unjustifiable conduct and Wis more appropriate forum

§ 822.21(1)(d)

- 5) No Ct of any other state would have jurisdiction under [paras. 1\)](#), [2\)](#), [3\)](#), or [4\)](#), above

§ 822.21(3)

B. Physical presence of, or personal jurisdiction over, party or child not necessary or sufficient to make custody determination

4. Exclusive, Continuing Jurisdiction

§_822.22

§_822.24

A. Except in emergency—child is present in state and has been abandoned, or needs protection from maltreatment or abuse—Wis Ct has exclusive, continuing jurisdiction over custody determination if made consistent with the UCCJEA, until either 1) or 2) below occurs

§_822.22(1)(a)

- 1) If one parent remains in Wis, but the other parent and the child no longer reside in Wis, Wis may cede jurisdiction if the Ct finds that there is no substantial connection between the nonresident parent or the child and substantial evidence is no longer available in Wis regarding the care of the child

§_822.22(1)(b)

- 2) Wis Ct or Ct of other state determines child, parents, and all persons acting as parent do not presently reside in Wis

§_822.22(2)

B. Wis Ct that made custody determination and does not have exclusive, continuing jurisdiction under [Sec. 4.A.](#), above, may modify that determination only if it has jurisdiction to make initial determination, under [Sec. 3](#) above

5. Subject-Matter Jurisdiction to Modify Determination

§_822.23

A. Wis Ct has subject-matter jurisdiction to modify child custody determination of Ct of another state only if

§_822.21(1)(a), (b)

- 1) Ct has jurisdiction to make initial determination because Wis is the home state, no other state is the home state, or a Ct in the child's home state declined to exercise jurisdiction, and either

§_822.23(1)

- a. Ct of other state determines it no longer has exclusive, continuing jurisdiction or that Wis Ct more convenient forum

§_822.23(2)

- b. Wis Ct or Ct of other state determines child, parents, and all persons acting as parents do not presently reside in other state

§_822.05

Vause v Vause

[140 Wis. 2d 157](#)

(Ct. App. 1987)

B. Applies to custody determinations of foreign Cts

6. Temporary Emergency Jurisdiction

§_822.24(1)

A. Wis Ct has temporary emergency jurisdiction if child is present in Wis and child has been abandoned or it is necessary in emergency to protect child because child, sibling, or parent is subject to or threatened with mistreatment or abuse

§_822.24(2)

- 1) If no previous custody determination and custody proceeding not commenced in Ct having jurisdiction above, temporary custody determination in effect until order obtained from Ct of state having jurisdiction under UCCJEA

If custody proceeding has not been or is not commenced in a proper Ct, temporary custody determination becomes final determination, if it so provides and Wis becomes home state of child

§ 822.24(3)

- 2) If previous custody determination entitled to be enforced, or custody proceeding has been commenced in state having jurisdiction, emergency order shall specify period that Ct considers adequate to allow person to obtain order from state having jurisdiction

Emergency order remains in effect until order obtained from other state within period specified or period expires

§ 822.24(4)

- 3) Wis Ct asked to make emergency determination, upon being informed that custody proceeding commenced in, or custody determination made by, Ct of state having jurisdiction shall immediately communicate with other Ct

If Ct is exercising child custody jurisdiction and is informed of information in [para. 3](#), above, it shall immediately communicate with Ct of other state to resolve emergency, protect safety of parties and child, and determine duration of temporary order

7. Full Faith and Credit Under PKPA

A. Wis Ct's order will be entitled to full faith and credit in other states under PKPA only if Ct has jurisdiction under Wis law and one of following conditions is met

28 [USC](#) 1738A(c)

- 1) Wis is child's "home state"

Home state as defined in UCCJEA, above

- 2) Wis had been child's home state within 6 months before proceedings commenced and a contestant continues to live in Wis
- 3) It appears that no other state has home state jurisdiction and it is in best interests of child that Wis Ct assume jurisdiction because
 - a. Significant connections with Wis, and
 - b. Substantial evidence available here about child's present or future care, protection, training, and personal relationships
- 4) Child is physically present in Wis and has been abandoned

- 5) Child is physically present in Wis and needs emergency protection because child, sibling, or child's parent was subjected to or threatened with mistreatment or abuse
- 6) In child's best interests to assume jurisdiction, and
 - a. It appears that no other state would have jurisdiction under grounds listed above, or
 - b. Another state has declined to exercise jurisdiction on grounds that Wis is more appropriate forum

8. Proceedings Pending in Another State

§_822.26(1)

A. Under UCCJEA, Wis Ct shall not exercise jurisdiction if custody proceeding was pending in Ct of another state at time petition was filed in Wis

Hatch v Hatch
(In re Custody of KMK)
[2007 WI App 136](#)
[302 Wis. 2d 215](#)

- 1) If other state Ct is exercising jurisdiction substantially in conformity with UCCJEA
- 2) Unless other proceeding is terminated or stayed because Wis Ct is more convenient forum

§_822.26(2)

- 3) Before hearing, Ct must examine pleadings concerning jurisdiction

§_822.29(1), (3)

May examine parties under oath with regard to jurisdictional information

§_822.26(2)

- 4) If Ct determines custody proceedings properly pending in another state and not an emergency
 - a. Stay Wis Ct proceedings and
 - b. Communicate with Ct of other state
 - c. Unless Ct of other state determines Wis Ct is more appropriate forum, Wis Ct shall dismiss proceeding

§_822.26(3)

- 5) In addition, if proceeding is to modify custody determination, Wis Ct shall determine whether proceeding to enforce custody determination commenced in other state. If it has, Ct may do any of the following
 - a. Stay modification proceeding pending entry of order of Ct of other state

- b. Enjoin parties from continuing proceeding for enforcement
- c. Proceed with modification under condition Ct considers appropriate

28 [USC](#) 1738A(g)

B. Under PKPA, Wis Ct shall not exercise jurisdiction if custody proceeding commenced while proceeding pending in Ct of another state

- 1) If other state Ct exercising jurisdiction consistently with provisions of PKPA

28 [USC](#) 1738A(c)

- 2) Other state Ct exercising jurisdiction consistently with PKPA only if

- a. Ct has jurisdiction under law of its state, and
- b. One of the conditions is met from [Sec. 7.A.](#), *supra*

Brown v Brown
[486 A2d 1116](#)
 (Conn 1985)

- 3) Mere filing of petition in one state Ct may not be sufficient exercise of jurisdiction to preclude jurisdiction of Ct in another state

9. Declining Jurisdiction—Inconvenient Forum

[§ 822.27\(1\)](#)

A. Ct with jurisdiction may decline to exercise jurisdiction at any time upon finding

- 1) It is inconvenient forum to make custody determination under the circumstances
- 2) Ct of another state is more appropriate forum

Upon Ct's own motion, or upon motion of party, or GAL or other representative of child

[§ 822.27\(2\)](#)
Hatch v Hatch
(In re Custody of KMK)
[2007 WI App 136](#)
[302 Wis. 2d 215](#)

B. Ct shall consider whether it is appropriate for another state to exercise jurisdiction considering all relevant factors including

- 1) Whether domestic violence has occurred and is likely to continue in future and which state could best protect parties and child

- 2) Length of time that child has resided outside Wis
- 3) Distance between Wis Ct and Ct in state that would assume jurisdiction
- 4) Relative financial circumstances of parties
- 5) Any agreement of parties as to which state should assume jurisdiction
- 6) Nature and location of evidence required to resolve pending litigation, including testimony of child
- 7) Ability of Ct of each state to decide issue expeditiously and procedures necessary to present evidence
- 8) Familiarity of Ct of each state with facts and issues in pending litigation

§_822.27(3)

C. If Wis Ct finds it is inconvenient forum and Ct of another state is more appropriate forum, Wis Ct shall stay proceedings

- 1) On condition that custody proceeding be promptly commenced in other designated state
- 2) May impose any other just and proper conditions

§_822.27(4)

D. Wis Ct may decline to exercise custody jurisdiction if custody determination incidental to action for divorce or other proceeding and retain jurisdiction over divorce or other proceeding

10. Declining Jurisdiction by Reason of Conduct

§_822.28(1)

A. If Wis Ct has jurisdiction under UCCJEA because person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, Ct shall decline to exercise jurisdiction for custody decree unless any of the following occurs:

- 1) Parents and all persons acting as parents have agreed to exercise of jurisdiction
- 2) Ct otherwise having jurisdiction determines Wis more appropriate forum
- 3) No Ct of any other state would have jurisdiction

§_822.28(2)

B. If Wis Ct declines to exercise jurisdiction under [Sec. A.](#) above, it may fashion appropriate remedy to ensure child's safety and prevent repetition of unjustifiable conduct, including staying proceeding until custody proceeding commenced in Ct having jurisdiction

§_822.28(3)

C. On dismissal or stay of proceeding, Ct may assess against party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, Atty fees, investigative fees, expenses for witnesses, travel expenses, and expenses for child care during course of proceeding, unless party establishes assessment would be clearly inappropriate

- 1) Ct may not assess fees, costs, or expenses against state unless authorized by law other than UCCJEA

11. Enforcement of Custody Determination

§_822.33

A. Wis Ct shall recognize and enforce custody determination of another state if

- 1) Other Ct exercised jurisdiction in substantial conformity with UCCJEA or
- 2) Determination made under factual circumstances meeting jurisdictional standards of UCCJEA and
- 3) Determination has not been modified under UCCJEA
- 4) Wis Ct may use any remedy available under other law to enforce custody determination made by Ct of another state

§_822.32

22 USC 9001–9011

B. Wis Ct may enforce order for return of child made under Hague Convention on Civil Aspects of International Child Abduction as if it were a custody determination

C. Registration of custody determination

§_822.35(1)

- 1) Custody determination of Ct of another state may be registered in Wis

§_822.35(4)

- a. Party may ask for a hearing to contest validity of registered document within 20 days after service of notice
- b. At hearing, Ct shall confirm registered determination unless person contesting establishes any of following
 - Issuing Ct did not have jurisdiction under UCCJEA
 - Custody determination has been vacated, stayed, or modified by Ct with jurisdiction under UCCJEA
 - Person contesting registration was entitled to notice in underlying proceeding, but notice not given in accordance with §_822.08 in the proceedings before Ct that issued order for which enforcement is sought

§_822.35(5)

- c. If timely request for hearing not made, registration confirmed as a matter of law and person requesting registration and all persons served must be notified of confirmation

§_822.35(6)

- d. Confirmation of registered determination precludes further contest of determination as to any matter that could have been asserted at time of registration

§_822.34

D. Wis Ct without jurisdiction to modify custody determination may issue temporary order enforcing

- 1) Physical placement or visitation schedule made by Ct of another state, or
- 2) Physical placement or visitation provisions of custody determination of another state by translating “reasonable times” and other nonspecific terms into a specific physical placement or visitation schedule

If Ct makes order, it shall specify period Ct considers adequate to allow petitioner to obtain order from Ct having jurisdiction under UCCJEA. Order remains in effect until other Ct issues order or until period expires

E. Enforcement of registered determination

§_822.36(1)

- 1) Wis Ct may grant any relief normally available under Wis law to enforce registered custody determination

§_822.36(2)

- 2) Wis Ct shall recognize and enforce, but may not modify, except in accordance with UCCJEA, registered custody determination of Ct of another state

§_822.37

- 3) If proceeding for enforcement is commenced in Wis Ct and Ct determines that proceeding to modify determination is pending in Ct of another state having jurisdiction to modify determination, enforcing Ct shall immediately communicate with modifying Ct. Proceeding for enforcement continues unless enforcing Ct, after consultation with the modifying Ct, stays or dismisses proceeding

§_822.38

F. Petition for Enforcement

- 1) Petition must be verified
- 2) Certified copies of orders sought to be enforced and any order confirming registration must be attached
- 3) Petition for enforcement shall state all of following
 - a. Whether the Ct that issued determination identified jurisdictional basis it relied on in exercising jurisdiction, and, if so, what basis was

- b. Whether determination has been vacated, stayed, or modified by a Ct whose decision shall be enforced under UCCJEA and, if so, identify Ct, case number, and nature of proceeding
- c. Whether any proceeding has been commenced that could affect current proceeding, including proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, nature of the proceedings, and, if so, identify Ct, case number, and nature of proceeding
- d. Present physical address of child and respondent, if known
- e. Whether relief, in addition to immediate physical custody of child and Atty fees, is sought, including request for assistance from law enforcement officials and, if so, the relief sought
- f. If custody determination has been registered and confirmed under [§ 822.35](#), date and place of registration

[§ 822.38\(3\)](#)

- 4) Upon filing of petition, Ct shall issue order directing respondent to appear in person with or without child at a hearing
 - a. Ct may enter order necessary to ensure safety of parties and child
 - b. Hearing shall be held on next “judicial day” after service of order, unless that date is impossible

[§ 822.31\(1\)](#)

- Saturday, Sunday, and legal holidays are excluded
- If next judicial day not possible, hold on first day possible
- Ct may extend date of hearing at request of petitioner
- c. Order shall state time and place of hearing and advise respondent that at hearing Ct will order that petitioner may take immediate physical custody of child and payment of costs, fees, and expenses under [§ 822.42](#), and Ct may schedule hearing to determine whether further relief is appropriate, unless respondent appears and establishes one of the following
 - Custody determination has not been registered and confirmed under [§ 822.35](#) AND any of the following
 - Issuing Ct did not have jurisdiction under UCCJEA
 - Custody determination for which enforcement is sought has been vacated, stayed, or modified by Ct having jurisdiction to do so under UCCJEA

— Respondent was entitled to notice, but notice was not given in accordance with the standards of [§_822.08](#) in the proceedings before Ct that issued order for which enforcement is sought

- Custody determination for which enforcement is sought was registered and confirmed but has been vacated, stayed, or modified by Ct having jurisdiction under UCCJEA

[§_822.39](#)

5) Petition and order must be served upon respondent and any person with physical custody of child

- May use any method authorized by Wis law except that there must be personal service if Ct issues warrant for physical custody of child, see [Sec. G.](#), below

G. Warrant to take physical custody of child

[§_822.41](#)

1) Upon filing petition for enforcement petitioner may file verified application for issuance of warrant to take physical custody of child. Application must include statements from [Sec. 11.F.3](#)), above

a. Ct may issue warrant if finds child imminently likely to suffer serious physical harm or be removed from Wis

- Petition to be heard “next judicial day” after warrant executed, unless impossible
- Warrant to take physical custody of child shall

[§_822.41\(3\)](#)

— Recite facts upon which conclusion of imminent serious physical harm or removed from Wis is based and

— Direct law enforcement officers to take physical custody of child immediately and

— Provide for placement of child pending final relief

[§_822.41\(6\)](#)

b. Ct may impose conditions on placement of child to ensure appearance of child and custodian

[§_822.41\(4\)](#)

2) Respondent shall be served with petition, warrant, and order immediately after child taken into physical custody

[§_822.41\(5\)](#)

3) Warrant is enforceable throughout Wis

- Ct may authorize law enforcement officers to enter private property to take physical custody of child, if Ct finds, based on testimony, that less intrusive remedy not effective

- b. Ct may authorize law enforcement officers to make forcible entry at any hour if required by exigent circumstances of case

H. Hearing and Order

§_822.40(1)

- 1) Unless Ct issues temporary emergency order, upon finding that a petitioner is entitled to immediate physical custody of child, Ct shall order that the petitioner may take immediate physical custody of child unless respondent establishes one of [para. a.](#) or [para. b.](#), below
 - a. Child custody determination has not been registered and confirmed, and ANY of the following
 - Issuing court did not have jurisdiction under UCCJEA
 - Custody determination for which enforcement is sought has been vacated, stayed, or modified by Ct of state having jurisdiction to do so under UCCJEA
 - Respondent was entitled to notice, but notice was not given in accordance with standards of §_822.08 in proceedings before Ct that issued order for which enforcement is sought
 - b. Custody determination for which enforcement is sought was registered and confirmed, but has been vacated, stayed, or modified by Ct of state having jurisdiction to do so under UCCJEA

§_822.42

- 2) Ct shall award necessary and reasonable expenses incurred by or on behalf of prevailing party, including a state. Permissible expenses include:
 - a. Costs, communication expenses, Atty fees, investigative fees, expenses for witnesses, travel expenses, and expenses for child care during course of proceedings
 - Unless party from whom fees or expenses are sought establishes that award clearly inappropriate
 - Ct may not assess fees, costs, or expenses against a state unless authorized by law other than UCCJEA

§_822.40(2)

- 3) Ct may grant additional relief, including request for assistance of law enforcement

Ct may set further hearing to determine if additional relief appropriate

§_822.40(3)

- 4) Ct may draw adverse inference from party's refusal to testify on ground of self-incrimination

§_822.40(4)

- 5) Privilege against disclosure of communications between spouses and defense of immunity based on relationship of husband and wife or parent and child may not be invoked in proceeding for enforcement of custody determination

§_822.43

- 6) Wis Ct shall accord full faith and credit to order issued by another state, consistent with UCCJEA, that enforces custody determination by Ct of another state unless order vacated, stayed, or modified by Ct with jurisdiction to do so under UCCJEA

§_822.44

- 7) Appeal may be taken from final order for enforcement of custody determination

Unless Ct enters temporary emergency order, enforcing Ct may not stay order enforcing custody determination pending appeal

12. Judicial Bench Cards for Hague Convention Cases

Judicial bench cards for use in Hague Convention cases are available at <https://www.acf.hhs.gov/css/resource/judicial-bench-cards-for-uifsa-and-hague-convention-cases> (last reviewed Aug. 7, 2023)

FA 16: PATERNITY

1. Jurisdiction

§_767.001(1), §_767.80

A. Paternity may be determined as part of another action affecting the family, or as independent action

§_767.80(5)

- 1) May be joined with action for child support

§_767.80(5m)

- 2) No order establishing child support obligations, legal custody, or physical placement rights may be entered, unless
- a. Man presumed father under §_891.41(1), or
 - b. Man adjudicated father either under §_767.89 or by final order or judgment of Ct in another state, or
 - c. Man conclusively determined to be the child's father from genetic test results under §_767.804, or
 - d. Man acknowledged self to be father under §_767.805 or substantially similar law of another state

§_48.355(4g)

§_938.355(4g)

- 3) A Juv/children's Ct Judge may enter an order establishing paternity in a pending paternity action. The order would have the same effect as an order issued by the family Ct Judge

B. Personal jurisdiction

§_801.05(1)

- 1) Respondent is present in or domiciled in State when served, or

§_801.06

- 2) Respondent makes general appearance

§_767.01(2)

§_769.201(6)

- 3) Respondent had sexual intercourse in Wis with child's mother during period of conception

- 4) Affected child resides in Wis

St ex rel NRZ v GLC

[152 Wis. 2d 97](#) (1989)

Mere residence in Wis of child whose paternity in question insufficient to satisfy constitutional due process requirement that alleged father have minimal contact with State

- 5) Respondent resided with subject child in Wis

C. Child custody jurisdiction

§_767.41(1)(a)

- 1) Ct must have jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), [Ch 822](#)

- 2) See [FA 15](#) for details

§_767.80(1m)

D. Venue

- 1) Cty in which child or alleged father resides or is found, or
- 2) If alleged father deceased, Cty where estate being or could be probated

2. Commencement of Action

§_767.80(1)

Mayonia MM v Keith N

(Paternity of

Mayonia MM)

[202 Wis. 2d 460](#)

(Ct. App. 1996)

A. Persons entitled to initiate action or motion to establish paternity or rebut presumption under § 891.405, 891.407, or 891.41(1)

1) Child

WRW v Bartholomew
(Paternity of RWL)
[116 Wis. 2d 150](#) (1984)

- a. Has constitutional and statutory right. Action brought on child's behalf by DA before 1981 did not bar new action brought by child in 1982 under statute that took effect in 1981

§ 767.80(4)

- b. Regardless of who brings action, child may always be party

Chad MG v Kenneth JZ
(Paternity of Chad MG)
[194 Wis. 2d 689](#)
(Ct. App. 1995)

- c. Child's action may not be barred by previous action filed on behalf of biological mother

- No privity between mother and child

Amber JF v Richard B
(Paternity of Amber JF)
[205 Wis. 2d 510](#)
(Ct. App. 1996)

- No issue or claim preclusion

2) Biological mother

St v Jody AE
(Paternity of Joshua AE)
[171 Wis. 2d 327](#)
(Ct. App. 1992)

A necessary party

- 3) Man presumed to be father under § 891.405, 891.407, or 891.41(1), unless § 767.804 or 767.805(1) applies

§ 767.80(1)(d)

- 4) Man alleged or alleging himself to be father of child

Thomas MP v
Kimberly JL
(Paternity of Baby Doe)
[207 Wis. 2d 388](#)
(Ct. App. 1996)

NOTE: Requires best interest determination if child born when mother was married to another man, *see* [Sec. 4.C.3](#), *infra*

- 5) Personal representative of any person listed above if that person has died

6) Legal or physical custodian of child

[§_767.205\(2\)](#)[§_767.80\(1\)\(g\)](#)

7) State, or a delegate of State, as real party in interest

- a. If there is a completed application for legal services filed with child support program under [§_49.22](#) or whenever [§_767.80\(6m\)](#) or (6r) applies
- b. Whenever aid is provided on behalf of dependent child under [§§_49.19](#) (AFDC), 49.45 (Medical Assistance), 48.645 (foster care assistance), or 48.57(3m) or (3n) (child welfare services), or to custodial parent under [§§_49.141–.161](#) (W-2)
- c. Whenever aid previously provided on behalf of dependent child under [§§_49.19](#) (AFDC), 49.45 (Medical Assistance), 48.645 (foster care assistance), or 48.57(3m) or (3n) (child welfare services), or to custodial parent under [§§_49.141–.161](#) (W-2) and child's family eligible for continuing child support services under 45 [CFR](#) 302.33

[§_767.80\(6m\)](#)*State v Robin MW**(In re Paternity of TJDC)*[2008 WI App 60](#)[310 Wis. 2d 786](#)

- d. Regardless of parties' marital status, if six months have passed after State notified that no father named on birth record of child who is resident of Cty and paternity has not been conclusively determined from genetic test results under [§_767.804](#), adjudicated, or acknowledged EXCEPT

- If birth by artificial insemination
- If surrogate mother
- If otherwise provided by DCF rule

[§_767.80\(6\)\(a\)](#)

- e. State's action shall be brought by Attys responsible for support enforcement

[§_59.53\(6\)\(a\)](#)

- Cty must employ or contract with Attys to provide support enforcement

8) State in cases involving conclusive paternity determinations based on genetic test results under [§_767.804\(1\)\(d\)](#)[§_767.80\(1\)\(i\)](#)9) GAL appointed for child under [§_48.235](#), [§_767.407\(1\)\(c\)](#), or [§_938.235](#)[§_767.80\(1\)\(j\)](#)10) Parent of person listed under [paras. 2\), 3\), or 4\)](#) above, if parent liable or potentially liable for maintenance of a child of a dependent person under [§_49.90\(1\)\(a\)2](#). (See **Grandparental Liability Law**, [Sec. 15](#), below)[§_767.80\(1\)\(k\)](#)

- 11) In conjunction with the filing of a petition for visitation under [§_767.43\(3\)](#), a parent of a person who has filed a declaration of paternal interest under [§_48.025](#) or a parent of a person who (before April 1, 1998) filed a statement acknowledging paternity under [§_69.15\(3\)\(b\)3.](#) with respect to the child

B. Statute of limitation

[§_893.88](#)

James AO v George CB

(Paternity of James AO)

[182 Wis. 2d 166](#)

(Ct. App. 1994)

- 1) For child

19 years after birth

- 2) For all other petitioners

St v DB

(Paternity of DLT)

[137 Wis. 2d 57](#) (1987)

- a. 19 years after birth of child IF child born after 1978
- b. No cause of action if child born before 1978

C. Summons

[§_767.813\(5\)](#)

- 1) Forms in statute

- 2) Contents

- a. Description of nature of action
- b. Return date and time
- c. Right to an Atty

[§_767.83\(1\)](#)

- If indigent, right to Ct-appointed Atty if State is petitioner or petitioner represented by government Atty

- d. Direction to appear, warning that failure to appear may result in judgment of paternity or arrest
- e. Signature of Clerk of Ct or petitioner's Atty

- 3) Must be accompanied by notice (See [Sec. D.](#), below)

Not required if action brought by man alleging himself to be the father

§_767.813(6)

- 4) Must be accompanied by document listing factors used to determine child support under §_767.511(1m), and standards under [Wis. Admin. Code](#) Ch DCF 150

Provided without charge by Clerk of Ct

D. Notice

§_767.813(5g)

- 1) Form in statute

- 2) Contents

- a. Effect of judgment of paternity

- b. Right to an Atty only if genetic tests show not excluded as father and possibility is less than 99%

§_767.83(1)

- If indigent, right to Ct-appointed Atty if State is petitioner or petitioner represented by government Atty

- c. Right to request genetic tests

- d. Burden of proof on petitioner

- e. Defenses available

- f. Right to request a jury trial

- g. Warning that failure to appear at any stage in proceedings will result in default judgment

- h. Requirement of keeping Clerk of Ct informed of address

E. Petition

§_767.80(5)

- 1) Contents

- a. Entitled “In re Paternity of...”

- b. Name and date of birth of child if born, or that mother is pregnant
- c. Name of alleged father
- d. Whether any other paternity action is pending or has ever been commenced, with facts about previous judgments or dismissals
- e. Notice of right to request genetic tests

§_767.80(5)

- 2) May be joined with any other action for child support, except that title of action must be “In re Paternity of...”

§_767.80(7)

- 3) Clerk of Ct must provide, free of charge, document setting forth child support factors and standards to persons filing action

Copy need not be provided if State files the action

§_767.813(4)

§_801.11(1)(a), (b)

F. Service of pleadings

- 1) Summons and petition served by
 - a. Personal service within or without State
 - b. Substitute service within or without State if personal service not possible with reasonable diligence
 - c. By registered or certified mail with return receipt requested

§_801.02(1)

- 2) Service must be made within 90 days after filed with Ct

§_767.815

- 3) Time limit for service may be extended
 - a. Once for 60 days, without notice and upon petitioner’s demonstration of good cause; or
 - b. Until date summons actually served if Ct finds
 - Reasonable grounds to believe respondent knew mother was pregnant and respondent may be father, before time for service expired; and
 - Due diligence exercised in trying to serve respondent

[§_767.82\(6\)](#)

[§_818.02\(6\)](#)

- 4) If Ct or CCC finds petitioner cannot effect service upon respondent despite reasonable diligence, respondent may be arrested

[§_822.08](#)

- 5) If child custody is to be determined, service must comply with the requirements of UCCJEA

See [FA 15](#) for details

[§_767.217](#)

- 6) Cty Child Support Agency (CSA) must be served
 - a. If mother receiving AFDC/W-2 benefits, Medical Assistance, or foster care aid under [§_48.645](#), and
 - b. If order for support sought
 - c. Within 20 days after serving respondent or before filing in Ct

G. Agreements barring paternity action

[§_767.80\(2\)](#)

- 1) Any agreement between mother and alleged father after July 1, 1981, which is not Ct-approved, does not bar a paternity action
- 2) Ct may approve agreement barring paternity action if Ct finds that agreement not contrary to child's best interests

Weidner v WGN

(*Paternity of BWS*)

[125 Wis. 2d 212](#)

(Ct. App. 1985), *aff'd*,

[131 Wis. 2d 301](#) (1986)

- 3) Out-of-state agreements that violate constitutional rights do not bar Wis paternity actions

[§_767.80\(3\)](#)

H. Stay of action until birth

- 1) Paternity action brought before child's birth must be stayed until after birth, except for
 - a. Service of process and service and filing of pleadings
 - b. First appearance, and
 - c. Depositions to preserve testimony

3. Legal Representation

A. GAL must be appointed

§_767.82

- 1) For minor parent or alleged minor parent, unless already represented by an Atty

§_767.407(1)

- 2) For child when paternity of child born while mother lawfully married is questioned, under §_891.39

§_767.407(1)

- 3) For child when paternity proceeding combined with contested custody action, unless exception in §_767.407(1) (am) applies

§_767.407(1)

- 4) For child when Ct has special concern as to child's future welfare

§_767.82

B. GAL may be appointed for child in any paternity proceeding

C. Duties of GAL

- 1) Dual role

Bahr v Galonski

[80 Wis. 2d 72 \(1977\)](#)

- a. Active advocate for best interests of child regarding custody, support, and physical placement

Allen v Allen

[78 Wis. 2d 263 \(1977\)](#)

- b. Representative responsible for counseling and consulting with Judge

de Montigny v

de Montigny

[70 Wis. 2d 131 \(1975\)](#)

- 2) GAL has right and obligation to

- a. Interview clients

- b. Make appropriate investigation

- c. Call and cross-examine witnesses

§_767.407(4)

- d. Consider factors under §_767.41(5) and custody studies under §_767.405(14)

- e. Review and comment to Ct on any mediation agreement and stipulation made under §_767.405(12) and on any parenting plan filed under §_767.41(1m)

- f. Unless child otherwise requests, communicate to Ct the wishes of child as to child's legal custody or physical placement

- 3) GAL must be appointed in sufficient time to perform duties

*Waukesha Cty DSS v
CEW (In Int of CEW)*
[124 Wis. 2d 47](#) (1985)

- 4) GAL has right to participate in jury selection (including peremptory challenges) and to sum up for the jury

*de Montigny v
de Montigny*
[70 Wis. 2d 131](#) (1975)

- 5) GAL governed by standards of professional conduct

Marotz v Marotz
[80 Wis. 2d 477](#) (1977)

- 6) GAL's duties continue on appeal

[§_767.83](#)

D. Any party may be represented by counsel

[§_767.80\(6\)](#)

E. Cty Bds must designate Atty to represent State under [§_767.205\(2\)](#)

- 1) Designated Atty represents only the State
- 2) Designated Atty is only Cty Atty who may represent State when State delegates its authority
- 3) Cty or State Atty may not at same time represent the State under [§_767.205\(2\)](#) and serve as child's GAL, BUT
- 4) State Atty employed by DCF under [§_49.22](#) or by a Cty under [§_59.53\(6\)\(b\)](#), including DAs and corporation counsels, may act as GAL for child

[§_767.83](#)

F. Appointment of Atty for indigent respondent

- 1) Required if State is petitioner or petitioner represented by government Atty

Unless respondent knowingly and voluntarily waives

[§_767.83\(1\)](#)

- 2) Appointment as provided in [Ch 977](#) subject to limitations of [§_767.83\(2m\)](#)

[§_767.83\(2m\)](#)

- 3) Appointment provided only after genetic tests have been completed and only if results

- a. Fail to exclude alleged father, and

§_767.84(1m)

- b. Probability of respondent being father is less than 99%

- 4) Appointed counsel represents party in all proceedings relating to paternity

§_767.83(2)

- 5) No representation with regard to initial establishment of support, custody, placement, or related issues

4. Respondent's First Court Appearance

§_767.86

A. Held no sooner than 30 days after service, unless parties agree to earlier date

Chad MG v Kenneth JZ

(Paternity of Chad MG)

[194 Wis. 2d 689](#)

(Ct. App. 1995)

B. Ct should ensure that parties with similar interests are joined as additional parties

§_767.863(1)

§_767.813(5g)

C. Ct must inform parties

- 1) Judgment of paternity lawfully designates child as child of respondent

- a. Grants parental rights to respondent

- b. Creates right of inheritance for child

- c. Obligates respondent to pay child support

- Makes failure to pay support punishable by imprisonment as contempt of Ct

§_767.813(5g)

- 2) Respondent has right to counsel

- a. At own expense at pretrial, trial, and any further paternity proceeding

§_767.83(1)

- b. Appointed Atty if

- Respondent is indigent

- Petitioner is government Atty under [§_767.80\(1\)\(g\)](#) or [§_767.80\(6\)](#), and
- Only if results of one or more genetic tests show that respondent is not excluded as father and that statistical probability of respondent being father is less than 99.0%

[§_767.813\(5g\)](#)

3) Respondent, or any party, may request genetic tests; genetic test will be ordered on request, EXCEPT

St v AWO

(*Paternity of DAAP*)

[117 Wis. 2d 120](#)

(Ct. App. 1983)

St ex rel Scott v Slocum

[109 Wis. 2d 397](#)

(Ct. App. 1982)

- Genetic test of alleged father may only be ordered after determination at the pretrial hearing that paternity can be established and establishment in child's best interests

[§_767.863\(1m\)](#)

Thomas MP v

Kimberly JL

(*Paternity of Baby Doe*)

[207 Wis. 2d 388](#)

(Ct. App. 1996)

- When man other than child's mother's husband alleges he is father, and child born during marriage, Ct or Supplemental Ct Comm'r may determine, upon allegation of any party, that judicial determination of who father is, is not in best interests of child

- No genetic tests may be ordered and

Douglas L v Arika B

(*Paternity of WB*)

[2015 WI App 80](#)

[365 Wis. 2d 257](#)

- Action must be dismissed. Ct has discretion to dismiss with or without prejudice

[§_767.863\(1m\)](#)

Stuart S v Heidi R

(*In re Paternity of ARR*)

[2015 WI App 19](#)

[360 Wis. 2d 388](#)

— Action is dismissed if there are no Ct-ordered genetic tests

[§_767.855](#)

Stuart S v Heidi R

(*In re Paternity of ARR*)

[2015 WI App 19](#)

[360 Wis. 2d 388](#)

— Dismissal MAY be ordered after Ct-ordered genetic tests have been completed

[§_767.813\(5g\)](#)

4) Respondent's defenses include

- Respondent was sterile or impotent at time of conception

- b. No sexual intercourse with mother during a period 8 to 10 months before child's birth
- c. Another man had sexual intercourse with mother during 8-to-10-month period before birth

JJG v LH
(Paternity of JLH)
[149 Wis. 2d 349](#)
 (Ct. App. 1989)

- d. Statutory rape NOT a defense

5. Failure of Parties to Appear

[§_767.893\(1\)](#)

A. Failure of petitioner to appear at pretrial or trial

- 1) Ct may dismiss action on own motion or respondent's motion
- 2) If State is petitioner and unable to proceed, Ct may dismiss action on own motion or respondent's motion

B. Failure of respondent to appear when required

[§_767.893\(2\)](#)

- 1) Order shall be entered by Ct if
 - a. Respondent has been properly served and fails to appear
 - On return date
 - For scheduled genetic test
 - For pretrial hearing
 - For trial
- 2) Contents of order
 - a. Respondent is adjudicated the father
 - b. Appropriate orders for support, legal custody, and physical placement

[§_767.89\(3\)](#)
Kathryn B v Sheldon S
(Paternity of Tiffany B)

[173 Wis. 2d 864](#)

(Ct. App. 1993)

- c. Costs may be assessed, including expert witness fees

[§_767.893](#)

3) Service of order

- a. Personally served on respondent, or
- b. Mailed by regular, registered, or certified mail to last-known address of respondent

[§_767.893\(2\)\(b\)](#)

4) Default judgment may NOT be entered if more than one person alleged in petition to be father, UNLESS

- a. Only one of those persons fails to appear, and all other male respondents have been excluded as father OR
- b. Alleged father who fails to appear has had genetic tests under [§_49.225](#) or [§_767.84](#) showing that he is not excluded and that statistical probability of his parentage is 99% higher

[§_767.82\(6\)](#)

[§_818.02\(6\)](#)

5) Respondent may be ordered arrested if

- a. Ct or CCC finds that service cannot be had on respondent despite due diligence of petitioner, or
- b. Respondent fails to appear on return date, for a scheduled genetic test, on pretrial hearing or trial date, after he has been properly served with summons and petition, PROVIDED
 - This is not a first appearance

6. Discovery, Evidence, Testimony

[§_767.82\(4\)](#)

A. Civil rules of discovery ([Ch 804](#)) apply, except

- 1) No discovery later than 30 days before trial
- 2) May not solicit information about mother's sexual relations at any time other than probable time of conception

[§_767.87\(2\)](#)

At trial, such evidence inadmissible, unless offered by mother

[§_767.87\(1m\)](#)

- 3) If child born in State, petitioner must present certified copy of child's birth record or printed copy of record from State registrar to Ct

Document must be presented at earliest of

- a. Initial appearance
- b. Pretrial hearing
- c. Trial
- d. Before entry of judgment

B. “Another man” defense

[§_767.84\(6\)](#)

- 1) Any party may call a male witness to testify to sexual intercourse with mother at possible time of conception
 - a. Party calling witness must provide all other parties with name and address of witness at least 20 days before trial or pretrial hearing
 - b. If witness called without prior notice, Ct may adjourn proceeding before his testimony
 - For purpose of genetic tests
 - If Ct finds party calling witness acted in good faith

[§_767.87\(3\)](#)

- 2) Alleged father must make available his own genetic test report before he may offer “another man” defense

C. Genetic tests

[§_767.84\(1\)](#)

- 1) May be required of child, mother, alleged father, or any male witness who will testify about his sexual relations with mother at possible time of conception

[§_767.84\(1\), \(6\)](#)

- 2) Must be ordered on request of any party

[§_767.84\(7\)](#)

Ct must ensure that all parties are aware of right to request genetic tests

St v AWO

(Paternity of DAAP)

[117 Wis. 2d 120](#)

(Ct. App. 1983)

St ex rel Scott v Slocum

[109 Wis. 2d 397](#)

(Ct. App. 1982)

- 3) Genetic test of alleged father may only be ordered after a determination at the pretrial hearing that paternity can be established and establishment is in child's best interests

§_767.84(1)

- 4) Expert qualified as examiner of genetic markers present on cells and components must be appointed by Ct

Comment

- 5) Blood tests normally performed by laboratories in Wis include
 - a. Six “red cell antigen” tests—ABO, Rh, MNS, Kell, Duffy and Kidd, and
 - b. Red cell enzyme or serum protein tests

§_767.84(2), (5)

- 6) Independent tests by another laboratory shall be ordered on party's request

If two or more identical series of genetic tests are performed on same person, Ct may require requesting party to pay in advance for tests

JLK v JJ

(Paternity of JLK)

[151 Wis. 2d 566](#)

(Ct. App. 1989)

- 7) DNA test results that are completed, certified, and filed according to statutory requirements are admissible under §_767.84's broad language governing blood test admissibility

§_767.84(2)

- 8) Tests in addition to those initially performed may be ordered by Ct on request of any party

§_767.84(1)

- 9) Genetic test report completed and certified by a Ct-appointed expert admissible as evidence without expert testimony
 - a. Report may be entered into record at trial or pretrial hearing if party offering report files it with Ct and notifies all other parties of filing at least 10 days before trial or pretrial hearing

St ex rel TRS v LFE

(Paternity of TLS)

[125 Wis. 2d 399](#)

(Ct. App. 1985)

- b. Statistical conclusions of report as to probability of paternity admissible without expert testimony on statistics
 - Def may challenge underlying assumption of test only if expert called or learned treatise introduced into evidence

§_767.84(4)

- 10) Tests are conclusive evidence when they exclude an alleged father or male witness from paternity

St v MTD

(Paternity of SJK)

[132 Wis. 2d 262](#)

(Ct. App. 1986)

- a. Does not preclude ordering of additional or independent tests

[§_767.84\(4\)](#)

- b. Testimony relating to persons excluded by tests is inadmissible

[§_767.84\(4\)](#)

11) Refusal to submit to genetic tests

- a. Fact to be disclosed to fact-finder
- b. If mother brings action but refuses to submit herself or child to a genetic test, action must be dismissed
- c. Is a contempt of Ct under [§_767.87\(5\)](#)

JPL v JH
(*Paternity of TPL*)
[120 Wis. 2d 328](#)
(Ct. App. 1984)

- Contempt for refusal is not a constitutional violation

[§_767.853](#)

D. Records of past/pending paternity actions

- 1) Kept in closed files
- 2) Records involving same child shall be open to child's parents, parties, and their Attys or authorized representatives
- 3) Information in files available to DCF or CSA for purposes related to administering child and spousal support and establishment of paternity and medical support liability program under [§§_49.22](#) and [59.53\(5\)](#), regardless of whether DCF or CSA is party to proceeding
- 4) Subject to [§_767.13](#), record of past proceeding open to public inspection if all the following apply
 - a. Paternity established in the proceeding
 - b. Record filed after May 1, 2000
 - c. Record relates to post-adjudication issue

St ex rel Dombrowski
v Moser
[113 Wis. 2d 296](#) (1983)

E. Information in mother's AFDC/W-2 file

- 1) Respondent may have access if

- a. Respondent submits affidavit sufficient to show some basis for belief that AFDC/W-2 file contains relevant evidence germane to his defense, and
 - b. On basis of sufficient affidavit, Ct must review file in camera, and
 - c. Release to respondent only that information required for a proper defense
- 2) Ct must instruct parties that information to be used solely for the paternity proceeding
- a. Any other use of information will subject violator to possible fines and imprisonment

F. Admissible evidence at trial and pretrial

§_767.87(1)

- 1) Sexual intercourse between mother and alleged father at possible time of conception, and relationship between mother and alleged father at any time

§_767.87(2)

- a. Testimony regarding possible sexual relations of mother at time other than possible time of conception inadmissible unless offered by mother

§_767.87(3)

- b. Evidence offered by alleged father about another man's sexual intercourse with mother at or about presumptive time of conception is admissible only after alleged father has had genetic tests and made results available to Ct

TAT v REB
(Paternity of MJB)
[144 Wis. 2d 638](#) (1988)

- c. Intercourse is element of paternity but does not require independent verdict before trier of fact considers HLA test report

§_767.87(1)

- 2) Expert opinion concerning statistical probability of alleged father's paternity, based on duration of pregnancy

§_891.395

- a. Time of conception of full-term child is presumed to be 240–300 days before birth

§_891.395

- b. Birth weight of 5-½ pounds or more presumptive evidence child was full-term

- May be proved by valid birth certificate or mother's testimony

St ex rel Skowronski
v Mjelde
[112 Wis. 2d 110](#) (1983)

- c. If child weighed less than 5-½ pounds at birth, petitioner must present evidence about time period of conception

§_767.87(1)

3) Genetic test results

4) Statistical probability of paternity based on genetic tests

TAT v REB

(Paternity of MJB)

[144 Wis. 2d 638](#) (1988)

Once there is competent evidence on record that there was sexual intercourse during conceptive period, results of blood tests, including statistics on probability of paternity, may be introduced

5) Other medical, scientific, or genetic evidence relating to paternity

[§_767.87\(2m\)](#)

a. Medical reports filed in TPR cases pursuant to [§_48.425\(1\)\(am\)](#) or (2) not admissible to prove paternity

[§_767.87\(7\)](#)

b. Testimony of physician about medical circumstances of pregnancy, and condition and characteristics of child at birth not privileged

[§_767.87\(1\)](#)

6) Other relevant evidence not excluded by [§_767.87\(2\)](#) (sexual relations by mother), (2m) (medical reports in TPR cases), and (3) (evidence of “other man” if alleged father has made available genetic test results)

G. Witness duties and immunities

[§_767.87\(4\)](#)

1) All witnesses have immunity for evidence given relating to paternity of child

Exception: Perjury

[§_767.87\(5\)](#)

2) Witness or party who refuses to testify or produce evidence may be ordered to do so by Ct

a. Refusal to obey such an order is contempt

[§_767.87\(6\)](#)

b. Exception: If State brings paternity action pursuant to AFDC/W-2, foster care aid, Cty child welfare services, or Medical Assistance assignment, biological mother may not be compelled to testify if agency has determined mother has good cause, under 42 [USC](#) [§_602\(a\)\(26\)\(B\)](#) (as of July 1, 1981) and applicable federal and State rules

7. Presumptions of Paternity

A. Male presumed to be child’s father

[§_891.39](#)

1) Husband

- a. When child born during a lawful marriage

[§_891.41](#)

- b. When child born or conceived after marriage and before a decree of separation, annulment, or divorce

[§_891.405](#)

2) Male if

- a. He and mother have acknowledged paternity in writing filed with State registrar under [§_69.15\(3\)\(b\)1.](#) or [§_69.15\(3\)\(b\)3.](#), AND no other man presumed to be father under [§_891.41](#)

[§_767.84\(1m\)](#)

- b. He is not excluded by genetic tests and statistical probability of parentage is above 99%

[§_891.41\(1\)\(b\)](#)

- c. He and biological mother were married to each other after child born but he and biological mother had relationship during conceptive period AND no other man has been adjudicated father or presumed to be father under [§_891.41\(1\)\(a\)](#)

- d. Unless

- Mother was married at time of conception or birth, or
- Another man who acknowledged paternity with State registrar was living with mother at time of conception

Randy AJ v Norma IJ

[2004 WI 41](#)

[270 Wis. 2d 384](#)

- 3) Husband may assert equitable estoppel defense against alleged father's use of genetic test results under [§_767.84\(1m\)](#) (*see* [Sec. 7.A.2\)b.](#), *supra*) as proof to rebut marital presumption of [§_891.41](#) (*see* [Sec. 7.A.1\)b.](#), *supra*)

Randy AJ v Norma IJ

[2004 WI 41](#)

[270 Wis. 2d 384](#)

- 4) Cannot use equitable parent doctrine in paternity determinations

B. Presumption is rebuttable

Schneider v Schneider

(*Est of Schneider*)

[150 Wis. 2d 286](#)

(Ct. App. 1989)

- 1) Sufficient rebuttal evidence that husband is not father is that he was

- a. Incompetent, or

- b. Entirely absent so as to have no intercourse or communication of any kind with mother, or
- c. Entirely absent during conceptive period, or
- d. Only present under circumstances affording clear and satisfactory proof that there was no sexual intercourse

St v JLT
(Paternity of MAV)
[149 Wis. 2d 548](#)
 (Ct. App. 1989)

C. Burden of proof on respondent to overcome presumption

JJG v LH
(Paternity of JLH)
[149 Wis. 2d 349](#)
 (Ct. App. 1989)

Determination in criminal proceeding, that male who has not attained age of 16 is incapable of consent to sexual intercourse, does not rebut presumption

[§ 767.82\(2m\)](#)

D. If no presumption of paternity, if paternity is conclusively determined under [§ 767.804\(1\)](#), or if paternity is acknowledged under [§ 767.805\(1\)](#)

Sole legal custody to mother until Ct orders otherwise

See also
Rosecky v Schissel
(In re Paternity of FTR)
[2013 WI 66](#),
[349 Wis. 2d 84](#)

8. Artificial Insemination

[§ 891.40](#)

A. Husband is child's father if woman was artificially inseminated

- 1) Under supervision of a licensed physician
- 2) With husband's written consent
 - a. Signed by him and his wife
 - b. Certified by a physician
 - c. Filed with DHS
- 3) Failure of physician to file consent form does not affect legal status of father and child

B. Donor of semen is not father and has no parental rights or liabilities

Unless recipient of semen is donor's wife

9. Pretrial Hearing Procedures

§_767.88(1)

A. Pretrial hearing is required

- 1) Before Ct or Supplemental Ct Comm'r

§_767.853

- 2) Closed to persons other than those necessary to the action

§_767.88(1)

- 3) Record or minutes of proceeding must be kept

§_767.88(1)

- 4) Parties may present and cross-examine witnesses and present other relevant evidence

§_767.88(1)

- 5) Parties may request genetic tests

§_767.88(2)

B. Ct shall evaluate probability of determining paternity at trial

- 1) Evaluation must be based on information presented at hearing

- 2) Parties must be informed of evaluation

§_767.855

C. Ct or Supplemental Ct Comm'r may dismiss action

- 1) At any time, in paternity action, upon motion of party or GAL, Ct, or Supplemental Ct Comm'r may determine that establishing paternity is not in the child's best interest

- a. Refuse to order genetic tests, if not yet taken

- b. Dismiss the action regardless of genetic test results, if any

§_767.88(2)

D. Ct may recommend settlement

- 1) Settlement options include

- a. Dismissal of action with or without prejudice
- b. Voluntary acknowledgment of paternity by alleged father. *See infra* [Sec. 14](#)
- c. If alleged father acknowledges paternity, that he agrees to duty of support, legal custody and periods of physical placement, and other matters as Ct determines to be in best interests of child

[§_767.88\(3\)](#)

- 2) If parties accept settlement recommendation, judgment entered

[§_767.88\(4\)](#)

- 3) If party or GAL refuses to accept recommendation

- a. Ct shall order genetic tests, if not yet taken
- b. After genetic tests, Ct shall make final recommendation for settlement

[§_767.88\(5\)](#)

E. If party or GAL refuses to accept final recommendation, action must be set for trial

[§_767.88\(6\)](#)

F. Whenever Ct finds it unlikely that all parties would accept a recommendation

- 1) Terminate pretrial hearing, and
- 2) Set action for trial

[§_767.80\(5m\)](#)

G. No order or temporary order for child support, legal custody, or physical placement may be entered unless

- 1) Man is presumed to be child's father (see [Sec. 7.](#), above), or
- 2) Man is adjudicated child's father under [§_767.89](#), or
- 3) Man is adjudicated child's father by final order of Ct of competent jurisdiction in another state, or
- 4) Man has acknowledged paternity under [§_767.805](#) or substantially similar law of another state, or
- 5) Statement of paternity under [§_69.15\(3\)\(b\)1.](#) or [§_69.15\(3\)\(b\)3.](#) is on file, or
- 6) Man is conclusively determined to be child's father from genetic test results under [§_767.804](#)

[§_767.80\(5m\)](#)

Note: No person may waive use of this procedure.

§_767.863(3)

H. Judgment may be entered based on statement acknowledging paternity signed and filed before April 1, 1998

- 1) Entered at first appearance if respondent does not dispute paternity

§_767.895

- 2) May be reopened, if no trial held, under same criteria as required to reopen default judgment (See **Relief from Judgment**, [Sec. 12](#), below)

10. Trial

§_767.853

A. Closed to persons other than those necessary to the proceeding

§_767.82(8)

§_767.235(1)

[SCR](#) ch. 71

B. Verbatim record must be made

§_767.883(1)

C. Held in two separate parts

- 1) Determination of paternity
- 2) Determination of support, legal custody, periods of physical placement, and related issues

D. Determination of paternity

§_767.883

- 1) Trial by 6-person jury available on issue of paternity ONLY IF
 - a. Respondent orally requests jury trial at initial appearance or pretrial, or
 - b. Respondent requests jury trial in writing, before pretrial hearing
- 2) If husband presumed to be child's father under [§_891.39](#), husband's paternity must be determined first
- 3) Parties present evidence and testimony
 - a. If mother not available to testify because of death, insanity, failure to commence or pursue action, or because she cannot be found within jurisdiction

§_767.883

- Proceedings may continue on motion of a person authorized to commence the action
- Mother's testimony at pretrial hearing, if any, may be read into record if competent, relevant, and material

St ex rel NAC v WTD

(*Paternity of AMC*)

[144 Wis. 2d 621](#) (1988)

- Fact-finder can decide that date of intercourse between mother and putative father is date other than one asserted by either party

St v RLB

(*Paternity of CMC*)

[155 Wis. 2d 331](#)

(Ct. App. 1990)

- Fact-finder can decide that mother used birth control and it was effective. Fact-finder then entitled to find that male is not father, despite statistical evidence that probability of his being father is 99.36%

[§_767.87\(8\)](#)

4) Burden of proof

- If presumption under [§_891.405](#), [§_891.407](#), or [§_891.41](#), party seeking to rebut presumption has burden of proof
- If no presumption, party seeking to establish paternity has burden of proof
- Proof required: Clear and satisfactory preponderance of evidence

[§_767.883\(1\)](#)

5) Special verdict

- May be used by Ct as to any issues relating to paternity
 - Must be used by Ct on request of any party
- Request must be made before introduction of any testimony on party's behalf

Comment

- Once paternity determined, Ct should make initial establishment of support

[§_48.355\(4g\)](#)

[§_938.355\(4g\)](#)

- A Juv/children's Ct Judge may enter an order establishing paternity in a pending paternity action. The order would have the same effect as an order issued by the family Ct Judge

[§_767.883\(1\)](#)

E. Support, legal custody, periods of physical placement, and related issues

- Always determined by Ct

[§_767.89](#)

- 2) Ct must make findings in [§_767.89\(2\)–\(4\)](#). See [Sec. 11](#) below

F. Elements of a prima facie case in a paternity action

St ex rel NAC v WTD
(Paternity of AMC)
[144 Wis. 2d 621](#) (1988)

- 1) Proof of the birth out-of-wedlock
- 2) Date of birth
- 3) Weight at birth
- 4) Conceptive period
- 5) Accusation that Def had sexual relations with complainant during conceptive period
- 6) Complainant's denial she had sexual relations with another man during the conceptive period

St ex rel NAC v WTD
(Paternity of AMC)
[144 Wis. 2d 621](#) (1988)

- a. Testimony of complaining witness that she had intercourse with Def and no one else during conceptive period sufficient to sustain verdict that Def is father if fact-finder believes her

11. Judgment

[§_767.89\(1\)](#)

A. Determination of existence or nonexistence of paternity determinative for all purposes

[§_767.883](#)

- 1) If trial by jury, a jury determination

- a. 6-person jury

[§_767.89\(2\)](#)

- 2) Within 30 days after entry of judgment or order, Clerk of Ct shall file report with State registrar

[§_767.89\(3\)](#)

B. Judgment/order must contain all the following

- 1) Adjudication of paternity of child
- 2) Orders for legal custody of and periods of physical placement with child, determined in accordance with [§_767.41](#) (See [FA 13](#), this volume for additional information)

- a. Custody and placement orders now mandatory in paternity actions
- b. In placement disputes, Ct must apply same standards as in other family matters

§_767.89(3m)

3) Order changing the child's name

- a. Upon the request of both parents, the Ct shall include in the judgment or order determining paternity an order changing the name of the child to a name agreed upon by the parents
- b. If the parents do not agree upon the child's name, the Ct may include in the judgment or order determining the paternity an order changing the surname of the child to a surname that consists of the surnames of both parents separated by a hyphen or, if one or both parents have more than one surname, of one of the surnames of each parent separated by a hyphen, if all of the following apply:
 - Only one parent requests that the child's name be changed, or both parents request that the child's name be changed but each parent requests a different name change; and
 - The Ct finds that such a name change is in the child's best interest

Scace v Schulte (In re Custody & Placement of AJS), [2018 WI App 30](#), [382 Wis. 2d 180](#)

- c. Ct lacks authority to change child's name in case of voluntary acknowledgment of paternity

§_767.89(3)(bm)

- 4) Information set forth in §_767.41(6)(h) to parents and any other person granted legal custody of the child. *See* [FA 13](#), *supra*

§_767.89(3)(c)

- 5) Order requiring either or both parents to contribute to support of any child of the parties who is less than 18 years old, or any child of the parties who is less than 19 years old if child is pursuing an accredited course of instruction leading to acquisition of a high school diploma or its equivalent, determined in accordance with §_767.511

Brad Michael L v Lee D (Paternity of Brad Michael L)
[210 Wis. 2d 437](#)
(Ct. App. 1997)

Father's liability for past support begins at birth of child regardless of his knowledge of child's existence. See limits in [Sec. D](#)—Past Support, *infra*

§_767.89(3)(d)

- 6) A determination as to which parent, if eligible, shall have right to claim child as exemption for federal income tax purposes under [IRC](#) § 151(c). Tax exemptions still need to be allocated for utilization of the child tax credit. The method for allocating the exemption is to require the party not claiming the exemption to execute IRS Form 8332

Rusk Cty Dep't of Health & Human Servs

v Thorson

[2005 WI App 37](#)

[278 Wis. 2d 638](#)

- 7) Order requiring father to pay or contribute to reasonable expenses of mother's pregnancy and child's birth, based on father's current ability to pay or contribute to those expenses

[§_767.89\(3\)\(e\)](#)

- a. Amount may not exceed one-half of the total actual and reasonable expenses
 - b. If father currently has no ability to pay, Ct may modify judgment or order at later date when father does have ability to pay
- 8) Order requiring either or both parties to pay or contribute to costs of GAL fees, genetic tests, and other costs
 - 9) Order requiring either party to pay or contribute to Atty fees of other party
 - 10) See chapter on **Custody/Placement**, [FA 13](#)

- 11) See chapter on **Visitation Rights of Certain Persons**, [FA 14](#)

[§_767.513](#)

C. Payment of child's health-care expenses

- 1) Ct must specifically assign responsibility and direct manner of payment
- 2) Ct must consider
 - a. Whether child is covered under a parent's health insurance policy or plan at time judgment entered
 - b. Availability of health insurance to each parent through employer or other organization
 - c. Extent of coverage available to child
 - d. Costs to parent for coverage of child
- 3) Ct may order either parent to provide insurance if:

[Wis Adm Code](#)

DCF 150.05(1)(b)1.

- a. It is accessible (providers located within reasonable distance to child's home)

[Wis Adm Code](#)

DCF 150.05(1)(b)2.

- b. It is available at reasonable cost (cost to place child on insurance is less than 5% of the parent's monthly income available for support (MIAFS))

- See [FA10, Sec. 3.B.](#) for definition of MIAFS

[Wis Adm Code](#)

DCF 150.05(1)(c)

- c. Ct may not require parent with income at 150% or less of poverty level to enroll a child in a private health insurance plan or contribute to its cost, unless there is no cost to the parent

- See [FA10, Sec. 3.A.](#), for poverty guidelines

4) If parent required to initiate or continue health-care insurance coverage

[§_767.513\(2\)](#)

- a. He or she shall provide copies of necessary program or policy identification to custodial parent

[§_767.513\(2\)](#)

- b. He or she is liable for any health-care costs for which he or she receives direct payment from an insurer

[Wis Adm Code](#)

DCF 150.05(1)(b)3.

- c. Ct may order non-insuring parent to contribute to insurance cost, but amount may not exceed 5% of non-insuring parent's gross income

[Wis Adm Code](#)

DCF 150.05(1)(b)4.

- d. Ct may include contribution for insurance cost as upward or downward child support adjustment

[§_767.89\(4\)](#)**D. Past support**

- 1) Liability for past support of child shall be limited to support for period after day on which petition is filed, unless a party shows, to satisfaction of Ct, all the following

- a. That he or she was induced to delay commencing the action by any of the following

- Duress or threats
- Actions, promises, or representations by the other party on which the party relied
- Actions taken by other party to evade paternity proceedings

- b. That after the inducement ceased to operate, he or she did not unreasonably delay in commencing the action

- 2) In no event may liability for past support of child be imposed for any period before birth of child

§_767.89(7)

E. Ct may order Atty for prevailing party to prepare findings of fact, conclusions of law, and judgment for Ct approval

12. Relief from Judgment

§_767.893(3)

A. Motion to reopen default judgment

- 1) May be made at any time for good cause
- 2) May be made upon motion under §_806.07
- 3) Must be made within one year after judgment

§_767.893(4)

- 4) Appeal of denial of motion to Ct of Appeals

§_806.07

B. Relief from judgment under Rules of Civil Procedure

§_806.07(2)

- 1) Motion shall be made within statutory time frame

St ex rel Cynthia MS

[181 Wis. 2d 618](#) (1994)

St ex rel MLB v DGH

[122 Wis. 2d 536](#) (1985)

- 2) Relief may be granted after one-year limitation for motions based on mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or misconduct, under §_806.07(1)(h) “other reasons justifying relief” when Ct finds extraordinary circumstances justifying relief

TED v PSG

(Paternity of LSG)

[170 Wis. 2d 231](#)

(Ct. App. 1992)

- a. Ct must weigh competing interests in finality of judgments and relief from unjust judgments

- Voluntariness of admission
- Best interest of child

St ex rel MLB v DGH

[122 Wis. 2d 536](#) (1985)

- b. “Extraordinary circumstances” existed when 18-year-old putative father signed paternity agreement in reliance on mother’s false statement, without counsel, without trial, and without blood tests, and recent blood tests

proved he was not child's father

St ex rel RAS v JM

[114 Wis. 2d 305](#)

(Ct. App. 1983)

- c. Advent of new, more accurate methods of blood testing not sufficient grounds for relief from long-standing paternity judgment

Gerhardt v

Est of Moore

[150 Wis. 2d 563](#) (1989)

C. Relief from judgment incorporating lump-sum child support settlement

- 1) Where admission of paternity and agreement to pay lump-sum settlement for child support is incorporated into judgment
 - a. Nonmarital child is entitled to seek prospective increase in child support under same conditions as marital child
 - See [FA 10, Sec. 12](#), Modifications, for procedure
 - b. To deny nonmarital children involved in lump-sum child support settlements ability to seek additional support, not denied marital children, amounts to denial of equal protection of law

[RMC Form FA-604A](#)

[RMC Form FA-604B](#)

13. Revision of Judgment

[§_767.89\(6\)](#), [§_767.41](#)

[§_767.43](#), [§_767.451](#)

[§_767.57](#), [§_767.58](#)

[§_767.59](#), [§_767.71](#)

[§_767.75](#), [§_767.76](#)

[§_767.77](#), [§_767.78](#)

A. Orders regarding support, legal custody, and periods of physical placement governed by same statutory provisions as in other actions affecting the family

[§_767.89\(6\)](#)

B. Ct may revise, reopen paternity judgment

Rules of civil procedure apply to reopening paternity judgments

14. Voluntary Acknowledgment of Paternity

A. Acknowledgment of paternity

42 [USC](#) 666(a)(5)(D)

- 1) Federal law requires states to have voluntary paternity acknowledgment programs that include hospital participation. In Wisconsin, this program is called Paternity Acknowledgment Through Hospitals (PATH). All hospitals must provide and explain the Voluntary Paternity Acknowledgment (VPA) form to a newborn child's parents who are not married to each other

§_69.15(3)(b)3.

- 2) Acknowledgment form must be filed with state registrar

§_767.805(1)

- 3) Statement acknowledging paternity, on file with state registrar, is a conclusive determination that shall be of same effect as judgment of paternity for forms signed after April 1, 1998

§_767.805(2)

B. Rescission of acknowledgment

§_69.15(3m)

- 1) Statement acknowledging paternity may only be rescinded by either person who signed as a parent of the child. Acknowledgment may only be rescinded before the earlier of either:
 - a. 60 days after the form is filed, *or*
 - b. Date on which Ct or CCC makes an order in an action affecting the family involving the man who signed the statement and the child who is the subject of the statement

C. Actions and orders when paternity acknowledged

§_767.805(3)

- 1) Action affecting the family concerning custody, child support, or physical placement rights may be brought with respect to persons who, with respect to a child, jointly signed and filed statement acknowledging paternity

§_767.805(4)

- 2) Ct order in action under §_767.805(3) shall contain all of the following provisions:

- a. Order for legal custody and periods of physical placement with child

§_767.805(4)(am)

- b. Information set forth in §_767.41(6)(h) to parents and any other person granted legal custody of the child. *See [FA 13](#), supra*

- c. Order requiring either or both parents to contribute to support of child

- d. Determination as to which parent is entitled to claim child as an exemption for state and federal tax purposes

See [IRC](#) § 24(a), (h),

151(d)(5);

Pub L No 115-97,

§§_11041, 11022 (2017)

NOTE: Federal tax law suspends the deduction for personal exemptions for taxable years beginning after December 31, 2017, and before January 1, 2026. Tax exemptions still need to be allocated for utilization of the

child tax credit, which is increased from \$1,000 to \$2,000 during the same years. The method for allocating the exemption is to require the party not claiming the exemption to execute IRS Form 8332.

- e. Order establishing father's obligation to pay or contribute to reasonable expenses of mother's pregnancy and child's birth, *and*
- f. Order requiring either or both parties to pay or contribute to GAL fees, Atty fees, and costs

Scace v Schulte (In re Custody & Placement of AJS), [2018 WI App 30](#), [382 Wis. 2d 180](#)

3) Ct cannot order change of child's name

[§_767.805\(4m\)](#)

D. Liability for past support

- 1) Liability for past support is limited to the period after the day on which the motion, petition, or order to show cause requesting support is filed, unless party shows to Ct's satisfaction all of the following:
 - a. That he or she was induced to delay commencing the action by any of the following
 - Duress or threats
 - Actions, promises, or representations by the other party on which the party relied
 - Action taken by the other party to evade proceedings, and
 - b. That after inducement ceased, he or she did not unreasonably delay in commencing the action
- 2) In no event may liability for past support be imposed for a period before child's birth

E. Voiding determination

[§_767.805\(5\)\(a\), \(b\)](#)

Determination of paternity that arises under [§_767.805](#) may be voided at any time upon a motion or petition stating facts that show fraud, duress, or mistake of fact. If Ct determines that the male is not the father of the child, Ct shall vacate any order entered under [§_767.805\(4\)](#) with respect to the male. No paternity action may thereafter be brought against the male with respect to the child

15. Grandparental Liability Law

[§_49.90\(1\)\(a\)2.](#)

JG v St

(Paternity of CJH)

[149 Wis. 2d 624](#)

(Ct. App. 1989)

A. Grandparents liable to support the children of their dependent children

[§_49.90\(11\)](#)

- 1) Parent of dependent male liable only if
 - a. His paternity determined as provided in [Ch 48](#) or
 - b. His paternity determined under [§§_767.80–767.895](#)

[§_49.90\(13\)\(b\)](#)

- 2) Parent of dependent person convicted of causing a pregnancy under [§_940.225\(1\)\(a\)](#) when birth occurs before dependent attains age of 18, is SOLELY liable for maintenance of dependent person's child

FA 17: ABUSE/HARASSMENT

NOTE: For additional materials, see Off. of Wis. Dir. of State Cts., *Restraining Order Service by Publication* (Dec. 2019), <https://courtnet.wicourts.gov/education/oje/docs/servicebypub.pdf>, and *Restraining Order Issues for the Judiciary: Frequently Asked Questions* (Oct. 2014), <https://courtnet.wicourts.gov/education/oje/docs/materials/njot2020/restrainingorderissues.pdf>.

1. Domestic Abuse

A. TRO and injunction available to adult family or adult household member who is victim of actual or threatened domestic abuse

[§_813.12\(1\)\(am\)](#)

B. “Domestic abuse”

- 1) A threat to commit or conduct as follows
 - a. Intentional infliction of physical pain, physical injury, or illness
 - b. Intentional impairment of physical condition
 - c. A violation of [§_940.225\(1\), \(2\), or \(3\)](#) (first-, second-, or third-degree sexual assault)
 - d. Violation of [§_940.32](#) (stalking)

St v Sevelin
[204 Wis. 2d 127](#)
 (Ct. App. 1996)

e. Criminal damage to property of the individual (includes joint property)

2) Engaged in by:

[§_813.12\(1\)\(am\)\(intro\)](#)

a. Adult family or adult household member against another adult family or adult household member

[§_813.12\(1\)\(b\)](#)

- Adult family member:

— Spouse or parent

— Adult child or adult related by blood or adoption

[§_813.12\(1\)\(c\)](#)

- Adult household member:

— Person currently or formerly residing in a place of abode with another person

[§_813.12\(1\)\(am\)\(intro\)](#)

b. Adult against adult former spouse

c. Adult against adult with whom person has child in common

[§_813.12\(1\)\(ad\)](#)

d. Adult caregiver against adult provided with in-home or community care through regular and direct contact

[§_813.12\(1\)\(ag\)](#)

e. Adult against adult with whom person has a romantic or intimate social relationship, considering

- Length of relationship
- Type of relationship
- Frequency of interaction of individuals

Schramek v Bohren
[145 Wis. 2d 695](#), 708–09
 (Ct. App. 1988)

3) [Sec.](#) 813.12(1) is not void for vagueness because prohibited conduct is sufficiently specific

Schramek v Bohren
[145 Wis. 2d 695](#), 709–10
 (Ct. App. 1988)

- 4) Statute does not violate respondent's 1st Amdmt rights because State can ban speech directed primarily at one unwilling to receive it and contact could be made through Atty

C. Jurisdiction

§_813.015

- 1) Ct has subject-matter jurisdiction regardless of whether alleged abuse occurred in Wis

- 2) Ct has personal jurisdiction if

§_801.05(1)

- a. Respondent is served in or domiciled in Wis, OR

§_801.05(11m)(a)3.

- b. Personal service permissible under US or Wis Constitution, OR

§_801.05(11m)(a)1.

- c. Act or threat of respondent occurred outside Wis and is part of ongoing pattern of harassment that has adverse effect on petitioner or member of petitioner's family or household AND petitioner resides in Wis AND either [para. e.](#) or [para. f.](#), *infra*, or both apply

§_801.05(11m)(a)2.

- d. Petitioner or member of petitioner's family or household has sought safety or protection in Wis as result of act or threat of respondent giving rise to petition AND either [para. e.](#) or [para. f.](#), *infra*, or both apply

§_801.05(11m)(b)

- e. Respondent has had direct or indirect communication with petitioner or member of petitioner's family or household while petitioner or member of family or household resides or is temporarily living in Wis, OR

§_801.05(11m)(b)

- f. Respondent has indicated a threat to the physical health or safety of petitioner or member of petitioner's family or household

§_801.05(11m)(b)

- g. Communication or indication under [paras. e. and f.](#), *supra*, includes communication through mail, telephone, electronic message or transmittal, and posting on electronic communication site, web page, or other electronic medium. If the electronic medium is generally available to any individual in Wis, it is sufficient for Ct to exercise personal jurisdiction

§_801.05(11m)(c)

- h. If Ct has personal jurisdiction under [paras. a.-f.](#), *supra*, and respondent served but does not appear or does not file response or motion asserting lack of personal jurisdiction, Ct shall hear action

- This does not limit respondent's right to challenge personal jurisdiction on appeal

§_813.12(2)

D. Commencement of action and response

[RMC Form CV-402](#)

- 1) Commenced with service of petition on respondent if copy of petition filed before service or promptly after service. May not be commenced by complaint and summons

§_813.12(5)(c)

2) Judge or CCC must accept any legible petition

- a. If petitioner does not use [RMC Form CV-402](#), Ct shall

[§_813.12\(2\)\(a\)](#)

- Inform petitioner in writing that if petitioner chooses to have documents served by sheriff, petitioner should contact sheriff to verify proof of service of petition

[§_813.12\(3\)\(d\)](#)

- Advise petitioner of right to serve petition by publication if with due diligence respondent cannot be served under [§_801.11\(1\)\(a\)](#) or (b)

[§_813.12\(2\)\(a\)](#)

[RMC Form CV-408](#)

- 3) If Judge or CCC extends time for hearing and petitioner files affidavit with Ct stating that personal service was unsuccessful because respondent is avoiding service, petitioner may serve respondent

[RMC Form CV-417](#)

- a. By publication of summary of petition as class 1 notice, under [Ch](#) 985

- Summary shall include names of petitioner and respondent, notice of TRO, and notice of date, time, and place of hearing

AND

[RMC Form CV-506](#)

- b. By mailing or sending fax if respondent's post office address or fax number is known or can with due diligence be ascertained

- Mailing or sending fax may be omitted if post office address or fax number cannot be ascertained with due diligence

[§_813.12\(2\)\(c\)](#)

- c. When respondent serves with petition, person serving shall also provide the following:

- Notice of requirements and penalties under [§_941.29](#) and notice of similar applicable federal laws and penalties
- Explanation of [§_813.1285](#), including procedures for surrendering firearm and circumstances under which respondent must appear at hearing to surrender firearms. *See [Sec. 5](#), infra*

[§_813.12\(5\)\(a\)](#)

[RMC Form CV-402](#)

4) Required elements of petition

- a. Name of petitioner and that petitioner is alleged victim

- b. Name of respondent

- c. That petitioner and respondent are both adults, and
- d. That respondent engaged in or, based on prior conduct of petitioner and respondent, may engage in domestic abuse of petitioner

§_813.12(5)(a)4.

- e. If petitioner knows of any other Ct proceeding in which petitioner is affected by Ct order containing provisions regarding contact with respondent, any of the following that are known by petitioner:

- Name or type of Ct proceeding
- Date of Ct proceeding
- Types of provisions regarding contact between petitioner and respondent

§_813.12(5)(am)

5) Petition shall request that

- a. Respondent be restrained from committing acts of domestic abuse against petitioner
- b. Respondent be ordered to avoid petitioner's residence
- c. Respondent avoid contacting petitioner or causing any person other than respondent's Atty to contact petitioner
 - Unless petitioner consents to contact in writing
- d. Or, any combination of above requests

§_813.12(5)(d)

6) Guardian of incompetent individual may file petition

§_813.12(5m)

7) Petition must not disclose address of alleged victim

§_813.12(2)(b)

8) May be filed in conjunction with action affecting family under [Ch 767](#)

Not necessary that action affecting family or any other action be commenced in order for TRO or injunction to be issued

§_813.127

9) May be combined with action for harassment or child abuse TRO and injunction or both

If combined with action for child abuse TRO or injunction, matter must be heard by Judge

§_813.06

10) No bond required

§_813.12(2)(b)

11) Response

a. May be in writing at or before hearing on injunction, or

[RMC Form CV-403](#)

b. Orally at hearing

E. Temporary Restraining Order (TRO)—Domestic abuse

§_813.12(3)(a)

1) Shall be issued by Judge or CCC upon

a. Filing of petition containing required elements

§_813.12(1)(cg)

b. Finding reasonable grounds, i.e., more likely than not, to believe respondent has engaged in or, based on prior conduct of petitioner and respondent, may engage in domestic abuse of petitioner

Blazel v Bradley

[698 F. Supp. 756](#)

(W.D. Wis. 1988)

c. Findings of fact showing an imminent danger of physical harm

§_813.12(3)(aj)

2) In determining whether to issue a TRO, Judge or CCC shall consider

a. Potential danger posed to petitioner, and

b. Pattern of abusive conduct of respondent

3) Decision to issue TRO may not be based solely on length of time since last domestic abuse or length of time since relationship ended

4) Judge or CCC may not dismiss or deny granting TRO because of pending action or other Ct order that bars contact between parties, nor because of necessity of verifying terms of existing Ct order

5) Judge or CCC may grant remedies requested by petitioner or any other appropriate remedy not inconsistent with those remedies

6) Notice need not be given to respondent before TRO issued

Blazel v Bradley
[698 F. Supp. 756](#)
 (W.D. Wis. 1988)

[Sec. 813.12](#) does not violate due process because there is a prompt post-deprivation hearing

Blazel v Bradley
[698 FS 756](#)
 (WD Wis 1988)

a. Petition must show risk of immediate harm to support TRO under Due Process Clause

[§_813.12\(7m\)](#)

7) Hearing must be recorded at request of petitioner

[§_813.12\(2m\)](#)
[RMC Form CV-409](#)
[RMC Form CV-446](#)

8) If Judge or CCC does not issue TRO, date for hearing on injunction shall be set upon motion of either party

9) Contents of TRO

[§_813.12\(3\)\(a\)](#)

a. May order respondent to refrain from committing acts of domestic abuse against petitioner

[§_813.12\(3\)\(a\)](#)

b. May order respondent to avoid petitioner's residence or any other location temporarily occupied by petitioner, or both

- Includes current and future residences/locations

[§_813.12\(3\)\(am\)](#)

c. EXCEPT: If petitioner and respondent not married and respondent owns premises where petitioner resides, and petitioner has no legal interest in premises

- May order respondent to avoid premises for reasonable time until petitioner relocates, and
- May order respondent to avoid petitioner's new residence for duration of injunction

[§_813.12\(3\)\(a\)](#)

d. May order respondent to avoid contacting or causing any person other than Atty or law enforcement officer to contact petitioner

- Petitioner may, however, consent in writing, to such contact

e. May order respondent to refrain from removing, hiding, damaging, harming, or mistreating, or disposing of, a household pet, or may allow petitioner, or family member or household member acting on petitioner's behalf, to retrieve a household pet

f. May order any combination of above remedies requested in petition or other remedy not inconsistent with remedies requested in petition

§_813.12(3)(b)

- g. May be issued only against respondent named in petition

§_813.12(5m)

- h. TRO may not disclose address of alleged victim

§_813.12(3)(c)

10) TRO in effect until hearing held on issuance of injunction

[RMC Form CV-408](#)

- a. Fourteen-day limit unless 14-day extension granted to try to effectuate service on respondent
- b. Extension requires finding of due diligence on petitioner's part to serve respondent
- c. Time may be extended on written consent of parties

§_801.58(2m)

§_813.12(3)(c)

- d. If Judge granting TRO substituted, TRO extended until new Judge holds hearing on issuance of injunction
 - New Judge may modify or vacate TRO

BUT

§_813.1285(1g)

- e. If Ct stays injunction, Ct shall extend TRO for 48 hours for firearm surrender

§_813.1285(1m)

- If Ct required to extend TRO under §_813.1285(1g), and TRO not previously granted, Ct shall, on own motion, reconsider and grant TRO

§_813.12(3)(c)

11) TRO not voided if respondent admitted into dwelling that order directs respondent to avoid

12) Implementation of TRO

§_813.12(6)(a)

- a. Upon request of petitioner, Judge or CCC shall order sheriff to accompany petitioner and assist in placing petitioner in physical possession of petitioner's residence

§_813.12(6)(ag)

- b. Petitioner may elect service by sheriff or, at own expense, use private process server to serve papers on respondent

§_813.12(6)(d)

- c. TRO enforceable regardless of other criminal or civil order restricting or prohibiting contact

F. Injunction hearing—Domestic abuse

§_813.12(3)(c)

1) Hearing procedure

a. Must be held within 14 days after TRO is issued unless

- Time is extended upon written consent of parties, or
- Substitution-of-Judge provisions of [§_801.58\(2m\)](#) apply, *see* [Sec. E.10\)d.](#) above, or
- One 14-day extension granted upon finding respondent has not been served with TRO despite petitioner's due diligence

[§_813.12\(7m\)](#)

b. To be recorded upon request of petitioner

[§_813.12\(6\)\(am\)](#)

[RMC Form CV-403](#)

c. Obtain information necessary to identify respondent for purposes of responding to a request under [§_165.63](#) (access to firearm prohibition orders) or for purposes of firearms restriction and for purpose of respondent's attempt to obtain a concealed weapon license

- Date of birth
- Sex
- Race
- Height
- Weight
- Hair color
- Eye color

2) Findings

[§_813.12\(4\)\(a\)](#)

a. Injunction may be granted by Judge or CCC upon finding, after hearing,

[§_813.12\(4\)\(a\)1.](#)

- Petition filed containing required elements, and

[§_813.12\(4\)\(a\)2.](#)

- Petitioner served upon respondent copy or summary of petition and notice of time for hearing, or
- Respondent served on petitioner notice of time for hearing, and

§ 813.12(4)(a)3., (1)(cg)

US v Rahimi

[144 S. Ct. 1889](#) (2024)

- Reasonable grounds, i.e., more likely than not, to believe respondent has engaged in or, based on prior conduct of petitioner and respondent, may engage in domestic abuse of petitioner

§ 813.12(4)(aj)

b. In determining whether to issue an injunction, the Judge or CCC shall consider

- Potential danger posed to petitioner, and
- Pattern of abusive conduct of the respondent

Wittig v Hoffart

[2005 WI App 198](#)

[287 Wis. 2d 353](#)

- Ct can consider underlying acts of former injunction to predict future conduct of respondent toward petitioner and to gauge seriousness of threats

§ 813.12(4)(aj)

c. Decision to issue an injunction may not be based solely on length of time since the last domestic abuse or length of time since the relationship ended

§ 813.12(4)(aj)

d. Judge or CCC may not dismiss or deny granting injunction because of existence of pending action or other Ct order that bars contact between parties, nor because of necessity of verifying terms of existing Ct order

18 [USC](#) 2265

e. For injunction to be given full faith and credit in other states for enforcement, Ct must find

- Respondent had opportunity to be heard
- Ct has personal and subject-matter jurisdiction

[RMC Form CV-404](#)

3) Contents of injunction

§ 813.12(4)(b)

a. May be entered only against respondent named in petition

b. No injunction may be issued under same case number against person petitioning for the injunction

§ 813.12(4)(a)

c. May order respondent to refrain from committing acts of domestic abuse against petitioner

d. May order respondent to avoid petitioner's residence/other locations for up to four years

- Includes current and future residence/other locations

§_813.12(4)(am)

e. EXCEPT: If petitioner and respondent not married and respondent owns premises where petitioner resides and petitioner has no legal interest in premises

- May order respondent to avoid premises for reasonable time until petitioner relocates, and
- May order respondent to avoid petitioner's new residence for duration of injunction

St v Carls
[186 Wis. 2d 533](#)
 (Ct. App. 1994)

- Respondent may be prosecuted for trespass even if has ownership rights in property if petitioner living there

§_813.12(4)(a)

f. May order respondent to avoid contacting or causing any person other than Atty or law enforcement officer to contact petitioner

- Petitioner may, however, consent in writing to the contact

§_813.12(4)(a)

g. May order respondent to refrain from removing, hiding, damaging, harming, or mistreating, or disposing of, a household pet, or may allow petitioner, or family member or household member acting on petitioner's behalf, to retrieve a household pet

h. May order any combination of above remedies requested in petition or not inconsistent with them

§_813.12(4m)(a)1.
 §_941.29

i. Must inform respondent that possession of firearm while injunction in effect is a Class G felony, and state possible penalties and also inform respondent of requirements and penalties under similar applicable federal laws

EXCEPT

§_813.12(4m)(ag)

- If respondent is peace officer who possesses firearms as a condition of employment as peace officer, or
- If respondent is member of armed forces or National Guard and possesses firearms in line of duty

See 18 [USC](#) 925(a)(1)

- Caveat: Federal law allows possession of firearms by peace officer or military personnel only if firearms are issued by governmental agency and firearms may be possessed only while on duty

§_813.12(4m)(a)2.

j. Shall require in writing surrender of any firearms respondent owns or has in possession to

- Sheriff of Cty where action commenced, or
- Sheriff of Cty where respondent resides, or
- Person designated by respondent and approved by Ct or CCC, in accordance with [§_813.1285](#)

[RMC Form CV-432](#)

— Ct or CCC shall inform person designated to receive surrendered firearms that knowingly furnishing respondent with firearm during period of injunction could make person subject to requirements and penalties under [§_941.2905](#) (straw purchasing of firearms)

[§_813.12\(4m\)\(ag\)](#)

k. EXCEPT, injunction cannot require respondent who is peace officer to surrender firearm that officer must possess as a condition of employment, whether or not respondent is on duty

[§_813.12\(5m\)](#)

l. Injunction must not disclose address of petitioner

4) Duration of injunction

[§_813.12\(4\)\(c\)](#)

a. Injunction is effective according to its terms, for period of time petitioner requests, but not for more than 4 years, EXCEPT

[§_813.12\(4\)\(d\)1.](#)

- Ct or CCC may order that injunction is in effect for not more than 10 years, if finds, by preponderance of evidence, any of following

— Substantial risk respondent may commit first- or second-degree intentional homicide against petitioner, or

— Substantial risk respondent may commit first-, second-, or third-degree sexual assault or first- or second-degree sexual assault of child against petitioner

[§_813.12\(4\)\(d\)1m.](#)

- A Judge or CCC may order that the injunction is in effect permanently if the respondent has been convicted of a violation of [§_940.225\(1\)–\(3\)](#) (first-, second-, or third-degree sexual assault) in which the petitioner was the crime victim

[§_813.12\(4\)\(d\)2.](#)

- Petitioner not prohibited from requesting new TRO or injunction before or at expiration of previously entered order or injunction

[§_813.12\(4\)\(c\)1.](#)

b. Injunction not voided by admittance of respondent into dwelling that injunction directs respondent to avoid

[§_813.12\(4\)\(c\)1.](#)

c. Injunction not voided if petitioner allows or initiates contact with respondent

§_813.12(4)(c)2.
Switzer v Switzer
[2006 WI App 10](#)
[289 Wis. 2d 83](#)
[RMC Form CV-507](#)

d. If injunction entered and petitioner states extension necessary to protect petitioner, Ct shall extend injunction up to 4 years after Ct first entered injunction

§_813.12(4)(d)1.

- Ct or CCC may grant an extension of injunction for up to 10 years after Ct or CCC first entered injunction if circumstances are found as shown under [para. 4\)a.](#) above

§_813.12(4)(c)4.

- No need to notify respondent until extension granted. Clerk of Ct must notify respondent after extension granted

§_813.126(1m)

e. If a respondent's criminal conviction that formed the basis for a permanent injunction has been vacated, the respondent may file a motion requesting a hearing to review the injunction. At the hearing, if the Judge finds that the conviction forming the basis for the permanent injunction has been vacated, the Judge shall modify the duration of the injunction or vacate the injunction. The Judge shall consider all relevant factors, including risk to petitioner, but no modified injunction may be in effect for longer than the maximum period allowable when the injunction was first ordered if the injunction had not been permanent

5) Implementation of injunction

§_813.12(6)(a)

a. Upon request of petitioner, Judge or CCC shall order sheriff to accompany petitioner and assist in placing petitioner in physical possession of petitioner's residence

§_813.12(6)(ag)

b. Petitioner may elect service by sheriff or, at own expense, use private process server to serve papers on respondent

§_813.12(4)(b)

6) Judge or CCC cannot modify order restraining respondent based solely on request of respondent

7) Return of firearms

[RMC Form CV-433](#)

a. Respondent may file petition for return of firearms if

§_813.1285(7)(a)

- Before surrendered firearm returned to respondent, Ct or CCC shall determine that

— Injunction has been vacated or has expired and not been extended

[RMC Form CV-434](#)

— Respondent not prohibited from possessing a firearm by any state or federal law or Ct order

§_813.1285(7)(b)

- b. If respondent surrenders a firearm owned by another person, person who owns firearm may apply for its return to Ct in Cty where firearm surrendered
 - Ct must give notice it considers adequate to all persons who may have interest in firearm and hold hearing as to claims to true ownership

[RMC Form CV-435](#)

- If right to possession proved to Ct's satisfaction, order firearm returned
- If firearm returned, Ct must inform person to whom returned that knowingly furnishing respondent with firearm during period of injunction could make person subject to requirements and penalties under [§_941.2905](#) (straw purchasing of firearms)

[§_813.12\(5g\)](#)

G.

Stipulation

- 1) Ct cannot approve stipulation to convert petition to one for TRO or injunction for harassment under [§_813.125](#) unless both of the following occur:

- a. Either or both parties submit oral request on the record explaining why conversion is requested

[§_813.12\(4\), \(4m\)](#)

[§_813.125\(4\), \(4m\)](#)

- b. Ct addresses petitioner personally and determines petitioner entered stipulation voluntarily and with understanding of differences between injunction and firearm-restriction orders for domestic abuse and such orders for harassment

H. Enforcement of orders

[§_813.12\(6\)\(d\)](#)

- 1) TRO and injunction enforceable despite existence of other criminal or civil order restricting or prohibiting contact

[§_813.12\(8\)](#)

- 2) Misdemeanor prosecution—Whoever knowingly violates a domestic abuse TRO or injunction may be fined \$10,000 or imprisoned up to 9 months, or both

[§_971.37\(1m\)\(a\)3.](#)

- a. DA may enter into deferred prosecution agreement if violation constitutes domestic abuse as defined in [§_813.12\(1\)\(am\)](#)

[§_973.09\(2\)\(a\)](#)

- b. Probation for up to 2 years may be appropriate

[§_813.129](#)

[§_301.49](#)

- 3) If respondent knowingly violates TRO or injunction, in addition to other penalties, Ct may report violation to DOC immediately upon respondent's conviction and may order respondent to submit to GPS tracking

- a. Before issuing order, Ct must find respondent more likely than not to cause serious bodily harm to petitioner
- b. Ct to consider:
 - Whether respondent has allegedly
 - Caused physical injury
 - Intentionally abused pets
 - Intentionally damaged property
 - Committed sexual assault
 - Committed act of strangulation, or
 - Committed forcible entry to gain access to petitioner
 - Whether respondent threatened any individual, including petitioner, with harm
 - Whether respondent has history of improperly using or threatening to use firearm or other dangerous weapon
 - Whether respondent has expressed suicidal ideation
 - Whether respondent has exhibited obsessive or controlling behavior toward petitioner or petitioner's family member, including stalking, surveillance, or isolation of petitioner or petitioner's family member
 - Respondent's mental health history
 - Whether respondent has history of abusing alcohol or controlled substance
- c. Ct may request DOC to provide validated risk assessment of respondent to make findings required in [para. b.](#) above
- d. If Ct orders GPS tracking, Ct shall provide petitioner with referral to domestic violence or sexual assault victim service provider

§ 813.126

I. New Hearing

[RMC Form CV-503](#)

- 1) Motion for hearing de novo of a determination, order, or ruling entered under [§_813.12](#) by CCC, including denial of request for TRO, must be filed within 30 days after issuance
- 2) Ct shall hold de novo hearing within 30 days after motion filed unless Ct finds good cause for extension
- 3) Any determination, order, or ruling entered under [§_813.12](#) by CCC remains in effect until Judge in de novo hearing issues final determination, order, or ruling

2.**Child Abuse**[§_813.122\(5\)\(d\)](#)**A. TRO and injunction available to prohibit contact between victim of child abuse and abuser**[§_813.122\(1\)\(b\)](#)**B. “Child.” Person under 18 years of age**[§_813.122\(1\)\(a\)](#)**C. “Abuse”**[§_48.02\(1\)\(a\), \(b\)–\(gm\)](#)

- 1) Means any of the following or threat to engage in any of the following
 - a. Physical injury inflicted on a child by other than accidental means
 - b. Sexual intercourse or sexual contact under [§_940.225](#), [§_948.02](#), [§_948.025](#), or [§_948.085](#)
 - c. Sexual exploitation of a child in violation of [§_948.05](#)
 - d. Child trafficking in violation of [§_948.051](#)
 - e. Permitting, allowing, or encouraging child prostitution in violation of [§_944.30](#)
 - f. Forcing a child to view or listen to sexual activity in violation of [§_948.055](#)
 - g. Causing a child to expose genitals, pubic area, or intimate parts for gratification in violation of [§_948.10](#)
 - h. Manufacturing methamphetamine in violation of [§_961.41\(1\)\(e\)](#) under specified circumstances involving exposure or potential exposure to children

- i. Emotional damage for which the child's parent, guardian, or legal custodian has neglected, refused, or been unable for reasons other than poverty to obtain the necessary treatment or to take steps to ameliorate the symptoms

§_48.02(5j)

- Emotional damage means harm to a child's psychological or intellectual functioning. It shall be evidenced by one or more of the following characteristics exhibited to a severe degree: anxiety; depression; withdrawal; outward aggressive behavior; or a substantial and observable change in behavior, emotional response, or cognition not within the normal range for the child's age and stage of development

D. Jurisdiction

§_813.015

- 1) Ct has subject-matter jurisdiction regardless of whether alleged abuse occurred in Wis
- 2) Ct has personal jurisdiction if

§_801.05(1)

- a. Respondent is served in or domiciled in Wis, OR

§_801.05(11m)(a)3.

- b. Personal service permissible under US or Wis Constitution, OR

§_801.05(11m)(a)1.

- c. Act or threat of respondent occurred outside Wis and is part of ongoing pattern of harassment that has adverse effect on petitioner or member of petitioner's family or household AND petitioner resides in Wis AND either [para. e.](#) or [para. f.](#), *infra*, or both apply

§_801.05(11m)(a)2.

- d. Petitioner or member of petitioner's family or household has sought safety or protection in Wis as result of act or threat of respondent giving rise to petition AND either [para. e.](#) or [para. f.](#), *infra*, or both apply

§_801.05(11m)(b)

- e. Respondent has had direct or indirect communication with petitioner or member of petitioner's family or household while petitioner or member of family or household resides or is temporarily living in Wis, OR

§_801.05(11m)(b)

- f. Respondent has indicated a threat to the physical health or safety of petitioner or member of petitioner's family or household

§_801.05(11m)(b)

- g. Communication or indication under [paras. e. and f.](#), *supra*, includes communication through mail, telephone, electronic message or transmittal, and posting on electronic communication site, web page, or other electronic medium. If the electronic medium is generally available to any individual in Wis, it is sufficient for Ct to exercise personal jurisdiction

§_801.05(11m)(c)

- h. If Ct has personal jurisdiction under [paras. a.–f.](#), *supra*, and respondent served but does not appear or does not file response or motion asserting lack of personal jurisdiction, Ct shall hear action

- This does not limit respondent's right to challenge personal jurisdiction on appeal

E. Commencement of action or response

§_813.122(2)(a)

- 1) By service of petition on respondent if copy of petition is filed before service or promptly after service. May not be commenced by complaint and summons. Service by publication is not permitted
 - a. Ct shall inform petitioner in writing that, if petitioner chooses to have documents served by sheriff, petitioner shall contact sheriff to verify proof of service of petition

§_822.29(1)

§_822.02(4)

[RMC Form GF-150](#)

- b. Petition must be accompanied by UCCJEA affidavit

§_813.122(5g)

- c. Petition must not disclose address of petitioner or of alleged child victim, but petitioner shall provide Clerk of Ct with own address and that of alleged child victim

2) May be filed

§_813.122(2)

- a. As independent action

§_48.25(6)

- b. In conjunction with Children's Ct proceeding under §_48.13

- Petitioners may include any party to, or governmental or social agency involved in proceeding

§_813.127

- c. In conjunction with action for domestic abuse or harassment injunction

- Pay only one filing fee
- May combine hearings but then must be heard by Judge

§_48.14(10)

3) Action must be filed in Children's Ct if respondent is a child

§_813.122(2)

4) Petitioner may be

- a. Child victim
- b. Parent
- c. Stepparent

d. Legal guardian

e. Governmental or social agency involved in proceeding under [§_48.13](#)

[§_813.122\(3\)\(c\)](#)

5) Action may pertain to more than one child victim

[§_813.06](#)

6) No bond required

[§_813.122\(2\)](#)

7) Respondent may respond

a. In writing before or at hearing

b. Orally at hearing

[RMC Form CV-412](#)

[RMC Form JC-1690](#)

F. Petition

[§_813.122\(6\)\(a\)](#)

1) Required elements

a. Name of petitioner

b. Name of child victim

c. Name of respondent

d. That respondent engaged in or, based on prior conduct of respondent and child victim, may engage in abuse of child

e. If child support requested, that payment is reasonable or necessary under [§_767.511](#) criteria

f. If petitioner knows of any other Ct proceeding in which petitioner is affected by Ct order containing provisions regarding contact with respondent, any of the following that are known by petitioner:

- Name or type of Ct proceeding
- Date of Ct proceeding
- Types of provisions regarding contact between petitioner and respondent

§_813.122(5g)

- 2) Petition must not disclose address of petitioner or of alleged child victim, but petitioner must provide Clerk of Ct with own address and that of alleged child victim

[RMC Form CV-413](#)

G. Temporary Restraining Order—Child abuse

§_813.122(4)

- 1) Shall be issued by Judge or CCC upon
 - a. Filing of petition containing required elements
 - b. Finding of reasonable grounds to believe that respondent has engaged in, or based on prior conduct of victim and respondent, may engage in, abuse of child

§_813.122(4)(b)

- 2) Notice need not be given to respondent before TRO issued

§_813.122(3)(b)1m.

[RMC Form GF-131A](#)

- 3) Judge or CCC may order appointment of GAL for child victim under §_48.235

§_813.122(3)(b)2m.

[RMC Form GF-131A](#)

- a. Must order appointment of GAL if respondent is parent of the child

§_48.235(8)(c)3.

- b. Ct cannot order child victim or any parent, stepparent, or legal guardian who is not party to action, to pay any part of GAL compensation

§_813.122(3)(a)

[RMC Form CV-409](#)

[RMC Form CV-447](#)

[RMC Form JC-1691](#)

- 4) If Judge or CCC does not issue TRO, date for hearing on injunction set upon motion by either party

- 5) Contents and duration of TRO

§_813.122(4)(b)

- a. May be issued only against respondent named in petition

§_813.122(4)(a)

- b. Orders respondent to avoid child victim's residence or premises temporarily occupied by child victim or both, and
- c. Orders respondent to avoid contacting or causing any person (other than Atty) to contact child victim

§_813.122(7)

- Contact means knowingly touching, meeting, communicating, or being in audio or visual contact

§_813.122(4)

- UNLESS petitioner consents in writing, and Judge or CCC agrees contact is in best interests of child

§_813.122(4)

- d. May order respondent to refrain from removing, hiding, damaging, harming, or mistreating, or disposing of, a household pet, or may allow petitioner, or family member or household member acting on petitioner's behalf, to retrieve a household pet

§_813.122(4)(c)

- e. TRO is in effect for up to 14 days until hearing held on issuance of injunction, UNLESS

- Extension granted once, for 14 days, on showing that respondent has not been served with TRO despite petitioner's due diligence, or
- Extension granted based on written consent of parties

§_801.58(2m)

§_813.122(4)(c)

- If Judge granting TRO substituted, TRO extended until new Judge holds hearing or issuance of injunction

— New Judge may modify or vacate TRO

BUT

§_813.1285(1g)

- If Ct stays injunction, Ct shall extend TRO for 48 hours for firearm surrender

§_813.1285(1m)

— If Ct required to extend TRO under §_813.1285(1g), and TRO not previously granted, Ct shall, on own motion, reconsider and grant TRO

§_813.122(9)(a)

6) Implementation of TRO

- a. Sheriff must assist petitioner in executing or serving TRO
- b. Petitioner may, at own expense, elect to use private process server to serve papers on respondent
- c. Respondent must be personally served. Service by publication is not allowed

H. Injunction hearing—Child abuse

§_813.122(4)(c)

1) Hearing procedure

- a. Must be held within 14 days after TRO is issued unless

[RMC Form CV-408](#)

- Time is extended upon written consent of parties, or

- Substitution-of-Judge provisions of [§_801.58\(2m\)](#) apply, *see* [Sec. G.5\)e.](#) above, or
- One 14-day extension is granted upon finding that respondent has not been served with TRO despite petitioner's due diligence

[§_813.122\(3\)\(bp\)](#)

- Judge or CCC may order that all persons other than parties, Attys, witnesses, child victim advocates, service representatives under [§_895.45\(1\)\(c\)](#), Ct personnel, and GALs be excluded from hearings

[§_813.122\(9\)\(am\)1.](#)

[RMC Form CV-413](#)

- Obtain information necessary to identify respondent for purposes of responding to a request under [§_165.63](#) (access to firearm prohibition orders) or for purposes of firearms restriction and for purpose of respondent's attempt to obtain a concealed weapon license

- Date of birth
- Sex
- Race
- Height
- Weight
- Hair color
- Eye color

2) Findings

[§_813.122\(5\)](#)

- May be granted by Judge only, not CCC, upon finding

[§_813.122\(5\)\(a\)1.](#)

- Petition filed containing required elements, and

[§_813.122\(5\)\(a\)2.](#)

- Petitioner served upon respondent copy of petition and notice of time for hearing, or respondent served on petitioner notice of time for hearing, and

[§_813.122\(5\)\(a\)3.](#)

US v Rahimi

[144 S. Ct. 1889](#) (2024)

- Reasonable grounds, after hearing, to believe respondent has engaged in or, based on prior conduct of child victim and respondent, may engage in abuse of child victim

18 [USC](#) 2265

b. For injunction to be given full faith and credit in other states for enforcement, Ct must find

- Respondent had opportunity to be heard
- Ct has personal and subject-matter jurisdiction

[RMC Form CV-414](#)

[RMC Form JC-1692](#)

3) Contents of injunction

[§_813.122\(5\)\(c\)](#)

a. May be entered only against respondent named in petition

[§_813.122\(5\)\(a\)](#)

b. Orders respondent to avoid residence or temporary premises of child

[§_813.122\(5\)\(a\)](#)

c. Orders respondent to avoid contacting or causing any person (other than Atty) to contact child victim

[§_813.122\(7\)](#)

- Contact means knowingly touching, meeting, communicating, or being in visual or audio contact

[§_813.122\(5\)\(a\)](#)

- Contact permissible if petitioner consents in writing to contact, and Judge agrees that contact is in best interest of child

[§_813.122\(5\)\(a\)](#)

d. May order respondent to refrain from removing, hiding, damaging, harming, or mistreating, or disposing of, a household pet, or may allow petitioner, or family member or household member acting on petitioner's behalf, to retrieve a household pet

[§_813.122\(5\)\(b\)](#)

e. If respondent is parent of child victim, Judge shall provide reasonable visitation rights

- Unless Judge finds visitation would endanger child's emotional, physical, or mental health
- May provide for supervised visits

Scott MH v Kathleen MH

(Int of Richard JH)

[218 Wis. 2d 605](#)

(Ct. App. 1998)

f. Ct may order transfer of custody or placement to non-respondent parent, instead of issuing injunction

[§_813.122\(5\)\(e\)](#)

g. Injunction may direct payment of child support as calculated under [§_767.511](#)

[§_813.122\(5m\)\(a\)1.](#)

[§_941.29](#)

h. Must inform respondent of requirements and penalties under [§_941.29](#) and similar applicable federal laws and penalties, EXCEPT

§_813.122(5m)(ag)

- If respondent is peace officer who possesses firearms as a condition of employment as peace officer, or

§_941.29(10)(b)

- If respondent is member of armed forces or National Guard and possesses firearms in line of duty

§_813.122(5m)(a)2.

- Shall require surrender of any firearms respondent owns or has in possession to

- Sheriff of Cty where action commenced, or
- Sheriff of Cty where respondent resides, or

[RMC Form CV-432](#)

- Person designated by respondent and approved by Ct or CCC

§_813.122(5m)(ag)

- EXCEPT, injunction cannot require respondent who is peace officer to surrender firearm officer required to possess as a condition of employment, whether or not respondent on duty

18 [USC](#) 925(a)(1)

- Caveat: Federal law allows possession of firearms by peace officer or military personnel only if firearms are issued by governmental agency and firearms may be possessed only while on duty

4) Return of firearms

[RMC Form CV-433](#)

- Respondent may file petition for return of firearms if

§_813.1285(7)(a)

- Before surrendered firearm returned to respondent, Ct or CCC shall determine that

— Injunction has been vacated or has expired and

[RMC Form CV-434](#)

— Respondent not prohibited from possessing a firearm by any state or federal law or Ct order

§_813.1285(7)(b)

- If respondent surrenders a firearm owned by another person, person who owns firearm may apply for its return to Ct in Cty where firearm surrendered

- Ct must give notice it considers adequate to all persons who may have interest in firearm and hold hearing as to claims to true ownership

[RMC Form CV-435](#)

- If right to possession proved to Ct's satisfaction, Ct must order firearm returned

[RMC Form CV-432](#)

- If firearm returned, Ct must inform person to whom returned that knowingly furnishing respondent with firearm during period of injunction could make person subject to requirements and penalties under

§_941.2905 (straw purchasing of firearms)

5) Duration and extension of injunction

§_813.122(5)(d)

- a. Injunction is effective according to its terms, but not for more than 2 years or until child reaches age 18, whichever occurs first, EXCEPT

§_813.122(5)(dm)1.

- Ct may order that injunction is in effect for not more than 5 years, if finds, by preponderance of evidence, any of following
 - Substantial risk respondent may commit first-degree intentional homicide or second-degree sexual assault of child victim, or
 - Substantial risk respondent may commit first-, second-, or third-degree sexual assault or first- or second-degree sexual assault of child victim

§_813.122(5)(d)1m.

- A Judge or CCC may order that the injunction is in effect permanently if the respondent has been convicted of a violation of §_940.225(1)–(3) (first-, second-, or third-degree sexual assault) in which the petitioner was the crime victim

§_813.122(5)(d)2.

[RMC Form CV-509](#)

- b. Injunctions may be extended

- If petitioner states extension necessary to protect child

§_813.122(5)(d)3.

[RMC Form CV-509](#)

- For total of 6 months after first entry of injunction, or until child reaches 18, whichever occurs first

- c. Any injunction may be extended

- If petitioner states extension necessary to protect child
- For up to 2 years or until child reaches age 18, whichever occurs first

§_813.122(5)(dm)1.

- d. Ct may grant an extension of injunction for up to 5 years after Ct first entered injunction if circumstances are found as shown under [para. 4\)a.](#) above

§_813.122(5)(d)4.

- e. Respondent need not be notified before extension is ordered. Clerk of Ct must notify respondent after extension granted

§_813.122(5)(dm)2.

- f. Petitioner not prohibited from requesting new TRO or injunction before or after expiration of previously entered order or injunction

§_813.126(1m)

- g. If a respondent's criminal conviction that formed the basis for a permanent injunction has been vacated, the respondent may file a motion requesting a hearing to review the injunction. At the hearing, if the Judge finds that the conviction forming the basis for the permanent injunction has been vacated, the Judge shall modify the duration of the injunction or vacate the injunction. The Judge shall consider all relevant factors, including risk to petitioner, but no modified injunction may be in effect for longer than the maximum period allowable when the injunction was first ordered if the injunction had not been permanent

§_813.122(9)(a)

6) Implementation of injunction

- a. Sheriff must assist petitioner in executing or serving injunction
- b. Petitioner may, at own expense, elect to use private process server to serve papers on respondent

[RMC Form CV-503](#)

§_813.126

I. New Hearing

- 1) Motion for hearing de novo of a determination, order, or ruling entered under §§_813.12, 813.122, 813.123, or 813.125 by CCC, including denial of request for TRO, must be filed within 30 days after issuance
- 2) Ct shall hold de novo hearing within 30 days after motion filed unless Ct finds good cause for extension

§_813.126

- 3) Any determination, order, or ruling entered under §_813.122 by CCC remains in effect until Judge in de novo hearing issues final determination, order, or ruling

J. Penalty

§_813.122(11)

- 1) Misdemeanor prosecution—Whoever knowingly violates a child abuse TRO or injunction may be fined \$1,000 or imprisoned up to 9 months, or both

§_973.09(2)(a)

- a. Probation for up to 2 years may be appropriate

K. Record

§_813.122(3)(bq)

- 1) Record is confidential
 - a. Available only to parties, their Attys, GAL, Ct personnel, child victim, law enforcement, and appellate Ct, except:

- Record may be available to any other person as required by law, as necessary to effect service or on Ct order for good cause shown

3. Individuals at Risk

§_813.123

A. TRO and injunction available

§_813.123(1)(ep)

B. “Individuals at risk” defined as either

§_813.123(1)(cg)

§_46.90(1)(br)

- 1) Elder adult at risk—person 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation

§_813.123(1)(ae)

§_55.01(1e)

- 2) Adult at risk—adult who has physical or mental condition that substantially impairs ability to care for own needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation

C. Other definitions under §_813.123

§_813.123(1)(a)

§_46.90(1)(a)

- 1) “Abuse” means any of the following

a. Physical abuse

b. Emotional abuse

c. Sexual abuse

d. Treatment without consent

e. Unreasonable confinement or restraint

§_813.123(1)(g)

§_46.90(1)(f)

- 2) “Neglect” means failure of caregiver to endeavor to secure or maintain adequate care, services, or supervision for an individual, including food, clothing, shelter, or physical or mental health care and creating significant risk or danger to individual’s physical or mental health

§_813.123(1)(gr)

§_46.90(1)(g)

- 3) “Self-neglect” means significant danger to individual’s physical or mental health because individual responsible for own care but fails to obtain adequate care, including food, shelter, clothing, or medical or dental care

§_813.123(1)(dm)

§_46.90(1)(ed)

4) “Financial exploitation” means any of the following

- a. Obtaining individual’s money or property by deceiving or enticing individual, or by forcing, compelling, or coercing individual to give, sell at less than face value, or in other ways convey money or property against individual’s will or without individual’s informed consent
- b. Theft, as defined in §_943.20
- c. Substantial failure or neglect of fiscal agent to fulfill responsibilities
- d. Unauthorized use of individual’s personal identifying information or documents, as prohibited in §_943.203
- e. Forgery, as prohibited in §_943.38
- f. Financial transaction card crimes, as prohibited in §_943.41

§_813.123(1)(b)

§_46.90(1)(aj)

5) “Bodily harm” means any of the following

- a. Physical pain or injury
- b. Illness
- c. Impairment of physical condition

§_813.123(1)(br)

§_46.90(1)(an)

- 6) “Caregiver” means a person who has assumed responsibility for all or portion of individual’s care voluntarily, by contract, or by agreement, including person acting or claiming to act as legal guardian

§_813.123(1)(d)

7) “False representation” includes a promise made with intent not to fulfill it

§_813.123(1)(e)

§_939.22(14)

- 8) “Great bodily harm” means bodily injury that creates substantial risk of death, causes serious permanent disfigurement, or causes permanent or protracted loss or impairment of function of bodily member or organ or other serious bodily injury

§_813.123(1)(eg)

§_813.125(1)(am)4.

9) “Harassment” has meaning given in §_813.125(1)(am)4. *See infra* [Sec. 4.B.](#)

§_813.123(1)(fm)

10) “Mistreatment of an animal” means cruel treatment of animal owned by or in service to individual at risk

§_813.123(1)(gs)

11) “Stalking” means engaging in course of conduct as defined in §_940.32(1)(a)

§_813.123(1)(am)

§_55.01(1f)

12) “Adult-at-risk agency” means agency designated by Cty Bd of Supervisors under §_55.043(1d) to receive, respond to, and investigate reports of abuse, neglect, self-neglect, and financial exploitation

D. Jurisdiction

1) Ct has personal jurisdiction if

§_801.05(1)

a. Respondent is served in or domiciled in Wis, OR

§_801.05(11m)(a)3.

b. Personal service permissible under US or Wis Constitution, OR

§_801.05(11m)(a)1.

c. Act or threat of respondent occurred outside Wis and is part of ongoing pattern of harassment that has adverse effect on petitioner or member of petitioner’s family or household AND petitioner resides in Wis AND either [para. e.](#) or [para. f.](#), *infra*, or both apply

§_801.05(11m)(a)2.

d. Petitioner or member of petitioner’s family or household has sought safety or protection in Wis as result of act or threat of respondent giving rise to petition AND either [para. e.](#) or [para. f.](#), *infra*, or both apply

§_801.05(11m)(b)

e. Respondent has had direct or indirect communication with petitioner or member of petitioner’s family or household while petitioner or member of family or household resides or is temporarily living in Wis, OR

f. Respondent has indicated a threat to the physical health or safety of petitioner or member of petitioner’s family or household

g. Communication or indication under [paras. e. and f.](#), *supra*, includes communication through mail, telephone, electronic message or transmittal, and posting on electronic communication site, web page, or other electronic medium. If the electronic medium is generally available to any individual in Wis, it is sufficient for Ct to exercise personal jurisdiction

§_801.05(11m)(c)

h. If Ct has personal jurisdiction under [paras. a.–f.](#), *supra*, and respondent served but does not appear or does not file response or motion asserting lack of personal jurisdiction, Ct shall hear action

- This does not limit respondent’s right to challenge personal jurisdiction on appeal

§_813.123(2)(a)

E. Commencement of action and response

[RMC Form CV-428](#)

- 1) Commenced with service of petition on respondent if copy of petition filed before service or promptly after service. May not be commenced by complaint and summons. Service by publication is not permitted
 - a. Ct shall inform petitioner in writing that, if petitioner chooses to have documents served by sheriff, petitioner should contact sheriff to verify proof of service of petition

§_813.123(5)(a)2.

- b. Petitioner must also serve notice to respondent that, if Ct or CCC issues injunction, Ct or CCC may order respondent not to possess firearm while injunction in effect

- Notice must include

- Requirements and penalties under §_941.29 and of similar applicable federal laws and penalties
- Explanation of §_813.1285, including procedures for surrender of firearm and circumstances under which respondent must appear at hearing to surrender firearms. *See* [Sec. 5](#), *infra*
- A firearm possession form developed under §_813.1285(5)(a) with instructions for completing and returning form

§_813.123(2)(a)

- 2) Petitioner may be

- a. Individual at risk
- b. Person acting on behalf of individual at risk
- c. Elder-adult-at-risk agency
- d. Adult-at-risk agency

Note: If petition filed by person other than individual at risk, petitioner must serve copy on individual at risk.

See §_813.06

§_813.123(2)(a)

- 3) No bond required

§_813.123(2)(a)

- 4) Respondent may respond

- a. In writing before or at hearing, or
- b. Orally at hearing

[§_813.123\(2\)\(b\)](#)

- 5) Ct may go forward with petition if individual at risk adjudicated incompetent notwithstanding objection by individual at risk or guardian

[§_813.123\(6\)](#)

[RMC Form CV-428](#)

F. Petition

1) Required elements

[§_813.123\(6\)\(a\)](#)

- a. Name of petitioner

- b. Name of individual at risk

[§_813.123\(6\)\(b\)](#)

- c. Name of respondent

- d. That respondent is an adult

[§_813.123\(6\)\(c\)](#)

- e. That respondent

- Interfered with or, based on prior conduct of respondent, may interfere with any of the following

— Investigation of elder adult at risk under [§_46.90\(5\)](#)

— Investigation of adult at risk under [§_55.043](#)

— Delivery of protective services to or protective placement of individual at risk under [Ch 55](#)

— Delivery of services to elder adult at risk under [§_46.90\(5m\)](#)

- Engaged in or threatened to engage in abuse, financial exploitation, neglect, stalking, or harassment of individual at risk, or

- Engaged in or threatened to engage in mistreatment of an animal

[§_813.123\(6\)\(d\)](#)

- f. If petitioner knows of any other Ct proceeding in which petitioner is person affected by Ct order or judgment that includes provisions regarding contact with respondent, any of the following that are known by petitioner

- Name or type of Ct proceeding

- Date of Ct proceeding
- Type of provisions regarding contact between petitioner and respondent

§_813.123(5g)

- 2) Petition must not disclose address of petitioner or of individual at risk, but petitioner shall provide Clerk of Ct with own address and that of individual at risk

§_813.123(3)

G. General Procedure

§_813.123(3)(a)

- 1) Procedure for action under §_813.123 is in 2 parts
 - a. If petitioner requests TRO, Ct or CCC shall issue or refuse to issue TRO

[RMC Form CV-429](#)

- If Ct or CCC issues TRO, order shall set date for hearing on injunction

[RMC Form CV-448](#)

- If Ct or CCC does not issue TRO, date for hearing set upon motion of either party

- b. Ct shall hold hearing on whether to issue injunction

§_813.123(3)(b)

- 2) Ct or CCC, on own motion or motion of any party, shall appoint GAL for individual at risk, if petition filed by person other than individual at risk

- a. In other instances, Ct or CCC may appoint GAL when justice so requires

§_813.123(3)(c)

- 3) Ct or CCC, on own motion or on motion of party, may order that

- a. All persons, other than individual at risk, parties, their Attys, representative of adult-at-risk agency or elder-adult-at-risk agency, witnesses, Ct personnel, and guardian or GAL, be excluded from any hearing
- b. Access to records of action under §_813.123 be available only to individual at risk, parties, their Attys, guardian or GAL, adult-at-risk agency or elder-adult-at-risk agency, Ct personnel, and, upon appeal, any applicable Ct

§_813.123(4)

H. Temporary Restraining Order—Individual at Risk

- 1) Unless individual at risk, guardian, or GAL consents in writing and Judge or CCC agrees contact is in best interest of individual at risk, TRO shall be issued by Judge or CCC upon

[RMC Form CV-428](#)

- a. Filing of petition containing required elements

b. Finding of reasonable grounds to believe any of following

- Respondent has interfered with or, based on prior conduct may interfere with, investigation of individual at risk, delivery of protective services to or protective placement of individual at risk under [Ch 55](#), or delivery of services to elder adult at risk under [§_46.90\(5m\)](#); and that interference complained of, if continued, would make it difficult to determine whether abuse, financial exploitation, neglect, or self-neglect has occurred, is occurring, or may occur
- Respondent engaged in or threatened to engage in abuse, financial exploitation, neglect, harassment, or stalking of individual at risk or in mistreatment of animal

[§_813.123\(4\)\(ar\)](#)
[RMC Form CV-429](#)

2) Contents and duration of TRO

a. Shall order respondent to do one or more of following

- Avoid interference with investigation of elder adult at risk under [§_46.90](#) or adult at risk under [§_55.043](#), delivery of protective services to or protective placement of individual at risk under [Ch 55](#), or delivery of services to elder adult at risk under [§_46.90\(5m\)](#)
 - Cease engaging in or threatening to engage in abuse, financial exploitation, neglect, harassment, or stalking of individual at risk or in mistreatment of animal
 - Refrain from removing, hiding, damaging, harming, or mistreating or disposing of a household pet
- Order may also allow the individual at risk (or a guardian, GAL, family member, or household member) to retrieve a household pet
- Avoid residence of individual at risk or other location temporarily occupied by individual at risk, or both
 - Avoid contacting or causing person other than party's Atty or law enforcement officer to contact individual at risk
 - Engage in any other appropriate remedy not inconsistent with remedies requested in petition
 - Not intentionally prevent representative or employee of Cty protective services agency from meeting, communicating, or being in visual or audio contact with adult at risk, except as provided in order

[§_813.123\(7\)](#)

[§_813.123\(12\)](#)

b. Shall include statement that TRO may be accorded full faith and credit in every civil or criminal Ct of US, civil or criminal Ct of other state, and Indian tribal Cts to extent such Cts have personal jurisdiction over nontribal members

§_813.123(4)(b)

- c. Notice need not be given to respondent before TRO issued

§_813.123(4)(c)

- d. May be entered only against respondent named in petition

§_813.123(4)(c)

- e. TRO is in effect for up to 14 days until hearing held on issuance of injunction, UNLESS
 - Extension granted once, for 14 days, on finding that respondent has not been served with TRO despite petitioner's due diligence, or
 - Extension granted based on written consent of parties

§_801.58(2m)

- If Judge granting TRO substituted, TRO extended until new Judge holds hearing on issuance of injunction

— New Judge may modify or vacate TRO, BUT

§_813.1285(1g)(c)

- If Ct stays injunction, Ct shall extend TRO for 48 hours for firearm surrender, if ordered

§_813.1285(1m)

— If Ct required to extend TRO under §_813.1285(1g), and TRO not previously granted, Ct shall, on own motion reconsider and grant TRO

§_813.123(4)(c)

- Ct or CCC may not extend TRO in lieu of ruling on issuance of injunction

§_813.123(8)

3) Implementation of TRO

- a. Sheriff must assist respondent in executing or serving TRO
- b. Petitioner may, at own expense, elect to use private process server to serve papers on respondent
- c. Respondent must be personally served. Service by publication is not allowed

I. Injunction Hearing—Individuals at Risk

1) Hearing procedure

§_813.123(4)(c)

- a. Hearing on injunction must be held within 14 days after Ct or CCC issues TRO unless

[RMC Form CV-408](#)

- Time extended upon written consent of parties, or

- Substitution-of-Judge provisions of § 801.58(2m) apply, *see* [Sec. H.2\)e.](#) above, or

[RMC Form CV-408](#)

- One 14-day extension is granted upon finding that respondent has not been served with TRO despite petitioner's due diligence

§ 813.123(5)(a)

2) Findings

a. Injunction may be granted by Judge only, not CCC, upon finding

- Petition filed containing all required elements
- Petitioner served upon respondent copy of petition and notice of time for hearing, or respondent served upon petitioner notice of time for hearing, and

§ 813.123(5)(a)3.

b. Reasonable cause to believe, after hearing

- Respondent interfered with or, based upon prior conduct of respondent, may interfere with investigation of elder adult at risk under § 46.90 or adult at risk under § 55.043 and that interference complained of, if continued, would make it difficult to determine if abuse, financial exploitation, neglect, harassment, or stalking of individual at risk, or mistreatment of animal is occurring or may reoccur
- Respondent interfered with delivery of protective services to or protective placement of individual at risk under [Ch 55](#) after offer of protective services or protective placement made and individual at risk or guardian, if any, consented to receipt of protective services or protective placement; or respondent interfered with delivery of services to elder adult at risk under § 46.90(5m)
- Respondent has engaged in or threatened to engage in abuse, financial exploitation, neglect, harassment, or stalking of individual at risk, or in mistreatment of animal

§ 813.123(5)(a)

c. Judge need not grant injunction if individual at risk, guardian, or GAL consents in writing to contact with respondent and Judge agrees that contact is in best interest of individual at risk

[RMC Form CV-430](#)

3) Contents of injunction

§ 813.123(5)(b)

a. May be entered only against respondent named in petition

§ 813.123(5)(ar)

b. Shall order respondent to do one or more of following

- Avoid interference with investigation of elder adult at risk under §_46.90 or adult at risk under §_55.043, delivery of protective services to or protective placement of individual at risk under [Ch 55](#) or delivery of services to elder adult at risk under §_46.90(5m)
- Cease engaging in or threatening to engage in abuse, financial exploitation, neglect, harassment, or stalking of individual at risk or in mistreatment of animal
- Refrain from removing, hiding, damaging, harming, or mistreating or disposing of a household pet

— Injunction may also allow the individual at risk (or a guardian, GAL, family member, or household member) to retrieve a household pet

- Avoid residence of individual at risk or any location temporarily occupied by individual at risk, or both
- Avoid contacting or causing person other than party's Atty or law enforcement officer to contact individual at risk
- Any other appropriate remedy not inconsistent with remedies requested in petition

§_813.123(7)

- Not intentionally prevent representative or employee of Cty protective services agency from meeting, communicating, or being in visual or audio contact with adult at risk, except as provided in order

§_813.123(12)

- c. Shall include statement that injunction may be accorded full faith and credit in every civil or criminal Ct of US, civil or criminal Ct of other state, and Indian tribal Cts to extent such Cts have personal jurisdiction over nontribal members

§_813.123(5m)(a)

- d. Ct or CCC may prohibit respondent from possessing firearms

US v Rahimi

[144 S. Ct. 1889](#) (2024)

- Only if clear and convincing evidence at hearing on injunction that respondent may use firearm to cause physical harm to another or endanger public safety

§_813.123(5m)(b)

- Prohibition of possession of firearms remains in effect until expiration of injunction

- e. Order prohibiting possession of a firearm shall

§_813.123(5m)(c)

- Inform respondent of the requirements and penalties under §_941.29 and any similar applicable federal laws and penalties

§_813.123(5m)(d)

— EXCEPT: If respondent is a peace officer who possesses a firearm as a condition of employment

§ 813.123(5m)(c)

- Require in writing surrender of any firearms respondent owns or has in possession to
 - Sheriff of Cty where action commenced
 - Sheriff of Cty where respondent resides
 - Person designated by respondent and approved by Ct or CCC

4) Duration and extension of injunction

§ 813.123(5)(c)1.

- a. Injunction is effective according to its terms, but for not more than 4 years, EXCEPT

§ 813.123(5)(d)1.

- Judge may order that injunction is in effect for not more than 10 years, if finds, by preponderance of evidence, any of the following
 - Substantial risk respondent may commit first- or second-degree intentional homicide against the person at risk
 - Substantial risk respondent may commit first-, second-, or third-degree sexual assault or first- or second-degree sexual assault of child against person at risk

§ 813.123(5)(d)1m.

- A Judge or CCC may order that the injunction is in effect permanently if the respondent has been convicted of a violation of § 940.225(1)–(3) (first-, second-, or third-degree sexual assault) in which the petitioner was the crime victim
- b. Judge may grant an extension of injunction for up to 10 years after Judge first entered injunction if circumstances are found as shown under [para. 4\)a.](#) above

§ 813.123(5)(d)2.

- c. Petitioner not prohibited from requesting new TRO or injunction before or at expiration of previously entered order or injunction

§ 813.123(5)(c)2.

- d. When injunction expires, Ct “shall extend”
 - If petitioner states extension necessary to protect individual at risk
 - For total of 6 months after first entry of injunction

§ 813.123(5)(d)1.

- Ct may grant an extension of injunction for up to 10 years after Ct first entered injunction if circumstances are found as shown under [para. 4\)b.](#) above

§_813.123(5)(c)3.

e. Injunction also may be extended

- If petitioner states extension necessary to protect individual at risk
- For up to 2 years

§_813.123(5)(c)4.

f. Respondent need not be notified before extension ordered. Clerk of Ct must notify respondent after extension granted

§_813.123(5)(d)2.

g. Petitioner not prohibited from requesting new TRO or injunction before or at expiration of previously entered order or injunction

§_813.126(1m)

h. If a respondent's criminal conviction that formed the basis for a permanent injunction has been vacated, the respondent may file a motion requesting a hearing to review the injunction. At the hearing, if the Judge finds that the conviction forming the basis for the permanent injunction has been vacated, the Judge shall modify the duration of the injunction or vacate the injunction. The Judge shall consider all relevant factors, including risk to petitioner, but no modified injunction may be in effect for longer than the maximum period allowable when the injunction was first ordered if the injunction had not been permanent

§_813.123(8)

5) Implementation of injunction

§_813.123(8)(a)

Upon request of petitioner, Ct or CCC shall order sheriff to assist in executing or serving injunction

§_813.126

J. New Hearing

[RMC Form CV-503](#)

- 1) Motion for hearing de novo of a denial of request for TRO by CCC under [§_813.123\(3\)\(a\)](#), must be filed within 30 days after issuance
- 2) Ct shall hold de novo hearing within 30 days after motion filed unless Ct finds good cause for extension

K. Enforcement of Orders

§_813.123(10)

Misdemeanor prosecution—Whoever intentionally violates individual at risk TRO or injunction may be fined up to \$1,000 or imprisoned up to 9 months, or both

Harassment

§_813.125

A. TRO and injunction are available to persons being harassed or intimidated

§_813.125(1)(am)4.

WWW v MCS

(*Paternity of CAS*)

[185 Wis. 2d 468](#)

(Ct. App. 1994)

B. “Harassment.” Definition parallels definition of criminal harassment, except that §_947.013 specifically excludes lawful conduct in labor disputes and does not list conduct included in [para. 2\)](#) below. [Sec. 813.125\(1\)\(am\)4.](#) includes the following acts or threatening to do the same

- 1) Striking, shoving, kicking, or otherwise subjecting another person to physical contact, or
- 2) Engaging in an act that would constitute abuse under §_48.02(1), sexual assault under §_940.225, or stalking under §_940.32
- 3) Threatening or attempting to engage in conduct described in [paras. 1\)](#) or [2\)](#) above, or
- 4) Engaging in course of conduct, or repeatedly committing acts that harass or intimidate another person and that serve no legitimate purpose

C. Jurisdiction

§_813.015

- 1) Ct has subject-matter jurisdiction regardless of whether alleged harassment occurred in Wis
- 2) Ct has personal jurisdiction if

§_801.05(1)

- a. Respondent is served in or domiciled in Wis, OR

§_801.05(11m)(a)3.

- b. Personal service permissible under US or Wis Constitution, OR

§_801.05(11m)(a)1.

- c. Act or threat of respondent occurred outside Wis and is part of ongoing pattern of harassment that has adverse effect on petitioner or member of petitioner’s family or household AND petitioner resides in Wis AND either [para. e.](#) or [para. f.](#), *infra*, or both apply

§_801.05(11m)(a)2.

- d. Petitioner or member of petitioner’s family or household has sought safety or protection in Wis as result of act or threat of respondent giving rise to petition AND either [para. e.](#) or [para. f.](#), *infra*, or both apply

§_801.05(11m)(b)

- e. Respondent has had direct or indirect communication with petitioner or member of petitioner’s family or household while petitioner or member of family or household resides or is temporarily living in Wis, OR

§_801.05(11m)(b)

- f. Respondent has indicated a threat to the physical health or safety of petitioner or member of petitioner's family or household

§_801.05(11m)(b)

- g. Communication or indication under [paras. e. and f., supra](#), includes communication through mail, telephone, electronic message or transmittal, and posting on electronic communication site, web page, or other electronic medium. If the electronic medium is generally available to any individual in Wis, it is sufficient for Ct to exercise personal jurisdiction

§_801.05(11m)(c)

- h. If Ct has personal jurisdiction under [paras. a.–f., supra](#), and respondent served but does not appear or does not file response or motion asserting lack of personal jurisdiction, Ct shall hear action

- This does not limit respondent's right to challenge personal jurisdiction on appeal

§_813.125(2)(a)

D. Commencement of action

- 1) Action commenced by filing petition, not by service of summons

§_813.127

- 2) May be combined with action for domestic or child abuse TRO or injunction or both if respondent same person

If combined with action for child abuse injunction, must be heard by Judge

§_813.125(4)(a)2.

§_813.125(3)(a), (b)

[RMC Form CV-406](#)

- 3) Petitioner must serve upon respondent a copy of TRO, if any, and reasonable notice of injunction hearing

§_813.125(4)(a)2.

- a. Person who serves respondent shall also provide respondent with following information:

- Notice of requirements and penalties under [§_941.29](#) and notice of similar applicable federal laws and penalties
- Explanation of [§_813.1285](#), including procedures for surrender of firearm and circumstances under [§_813.1285](#) under which respondent must appear at firearm surrender hearing
- A firearm surrender form developed under [§_813.1285\(5\)\(a\)](#), with instructions for completing and returning form

§_813.125(2)(a)

- b. Ct shall inform petitioner in writing that, if petitioner chooses to have documents served by sheriff, petitioner should contact sheriff to verify proof of service of petition

§_813.125(2)(a)

- c. If Judge or CCC extends time for hearing under [§ 813.125\(3\)\(c\)](#) because of nonservice of respondent, and petitioner files affidavit stating personal service unsuccessful because respondent is avoiding service, Judge or CCC shall inform petitioner that service may be

[RMC Form CV-505](#)

- By publication of a summary of petition as class 1 notice, under [Ch 985](#). Summary of published petitioner must include:
 - Name of respondent and petitioner
 - Notice of TRO
 - Notice of date, time, and place of hearing on injunction
- By mailing or faxing a copy of the petition if respondent's address or fax number is known or can be ascertained with due diligence
 - If address or fax number cannot be ascertained with due diligence, mailing or faxing may be omitted

Bachowski v Salamone
[139 Wis. 2d 397](#) (1987)
[RMC Form CV-405](#)

E. Petition

[§ 813.125\(2\)\(b\)](#)

- 1) Filing of petition by alleged victim, including a parent, stepparent, or legal guardian of child

[§ 48.235\(4\)\(a\)6.](#)

- a. GAL in CHIPS proceeding may file in Children's Ct harassment petition on behalf of child who is subject of that proceeding

[§ 48.25\(6\)](#)
[RMC Form JC-1693](#)

- b. Petition may be filed in Children's Ct if alleged victim or respondent or both are children or alleged victim is subject of CHIPS proceeding

[§ 813.125\(5\)\(a\)](#)

- 2) Petition shall state facts sufficient to show:

- a. Name of person who is alleged victim
- b. Name of respondent
- c. Respondent has engaged in harassment with intent to harass or intimidate alleged victim
- d. If petitioner knows of other Ct proceeding in which petitioner is affected by Ct order or judgment that includes provisions regarding contact with respondent, any of the following that are known by petitioner:

- Name or type of Ct proceeding
- Date of Ct proceeding
- Type of provisions regarding contact between petitioner and respondent

§_813.125(5)(am)

- 3) Petition shall state that if injunction issued, Ct or CCC may order respondent not to possess firearm while injunction in effect

§_813.125(5m)

- 4) Petition must not disclose address of petitioner, but petitioner shall provide Clerk of Ct with address

§_813.125(2g)

F. Guardian ad Litem

Ct or CCC, on own motion, or on motion of party, may appoint GAL for child who is party to action when justice so requires

§_813.125(2m)

G. Two-Part Procedure

- 1) If filing fee is waived

- a. Ct “shall issue or refuse to issue” TRO, if TRO requested by petitioner

- b. Ct shall hold hearing on whether to issue injunction

[RMC Form CV-406](#)

- If Ct issues TRO, order must include date for hearing on injunction

[RMC Form CV-409](#)

[RMC Form CV-449](#)

- If Ct does not issue TRO, date for hearing set upon motion by either party

§_813.125(3)

H. Temporary Restraining Order—Harassment

- 1) Shall be issued by Judge or CCC, upon finding

- a. Filing of petition containing required elements

- b. Reasonable grounds to believe respondent engaged in harassment with intent to harass or intimidate petitioner

- 2) Notice need not be given to respondent before issuing TRO

3) Contents and duration of TRO

§_813.125(3)(b)

- a. TRO may be entered only against the named respondent in petition

§_813.125(3)(a)(intro)

- b. May order respondent to avoid contacting or causing person other than party's Atty or law enforcement to contact petitioner without petitioner's written consent
- c. May order respondent to cease or avoid the harassment of alleged victim
- d. May order respondent to avoid alleged victim's residence or any premises temporarily occupied by alleged victim, or both

- Includes current and future residences/premises

§_813.125(3)(am)

- EXCEPT: If petitioner and respondent not married, and respondent owns premises where petitioner resides, and petitioner has no legal interest in premises

— May order respondent to avoid premises for reasonable time until petitioner relocates, and

— Shall order respondent to avoid petitioner's new residence for duration of TRO

- e. May order respondent to refrain from removing, hiding, damaging, harming, or mistreating, or disposing of, a household pet, or may allow petitioner, or family member or household member acting on petitioner's behalf, to retrieve a household pet
- f. Ct or CCC may order any combination of [paras. b.](#), [c.](#), [d.](#), and [e.](#) above

§_813.125(5g)(c)

- g. Upon request of petitioner, Ct or CCC shall order sheriff to accompany petitioner and assist in placing petitioner in physical possession of petitioner's residence or otherwise assist in executing or serving TRO. Petitioner may use private process server to serve papers

§_813.125(3)(c)

- h. TRO in effect for up to 14 days until hearing held on issuance of injunction, UNLESS

§_801.58(2m)

- Extension granted once, for 14 days, on showing respondent not served with TRO despite petitioner's due diligence, or
- Upon written consent of parties
- If Judge granting TRO substituted, TRO extended until new Judge holds hearing on issuance of injunction

— New Judge may modify or vacate TRO, BUT

§_813.1285(1g)

- If Ct stays injunction, Ct shall extend TRO for 48 hours for firearm surrender

§_813.1285(1m)

— If Ct required to extend TRO under §_813.1285(1g) and TRO not previously granted, Ct shall, on own reconsider and grant TRO

§_813.125(3)(c)

- Ct or CCC may not extend TRO in lieu of ruling on issuance of injunction

§_813.125(3)(c)

- Judge or CCC cannot dismiss or deny TRO because of existence of pending action or any other Ct order that bars contact between the parties, nor because of necessity of verifying terms of any existing Ct order

I. Injunction hearing—Harassment

§_813.125(3)(c)

1) Hearing procedure

- Must be held within 14 days after TRO is issued unless

- Time extended under circumstances set out in [Sec. H.3\)h.](#), above

WWW v MCS
(*Paternity of CAS*)
[185 Wis. 2d 468](#)
(Ct. App. 1994)

- May be continued if it begins within 7 days after issuance of TRO and respondent agrees to continuance

§_813.125(4)

2) May be heard and granted by Judge or CCC upon finding

- Filing of petition containing required elements
- Petitioner served a copy of TRO and notice of time for hearing on issuance of injunction with information required under [Sec. D.3\)a.](#) above
- Reasonable grounds to believe respondent engaged in harassment with intent to harass or intimidate petitioner
- Before issuing an injunction premised on a “true threat,” a Circuit Ct “must find that the respondent ‘consciously disregarded a substantial risk that [the respondent’s] communications would be viewed as threatening violence’”

Kindschy v Aish
[2024 WI 27](#), ¶ 21
[412 Wis. 2d 319](#)

3) Scope of injunction

WWW v MCS
(Paternity of CAS)
[185 Wis. 2d 468](#)
 (Ct. App. 1994)

a. Within sound discretion of Ct

[§_813.125\(4\)\(aj\)](#)

- Ct or CCC cannot dismiss or deny granting injunction because of existence of pending action of any other Ct order that bars contact between the parties, nor because of necessity of verifying terms of an existing order

b. Must be specific as to prohibited acts and conduct so one enjoined may know what actions to avoid

[§_813.125\(4\)\(a\)](#)

- #### c. Ct or CCC MAY order any combination of remedies in [paras. d., e., f., and g.](#), below
- #### d. Respondent must avoid contacting or causing any person other than party's Atty or law enforcement officer to contact petitioner without petitioner's written consent
- #### e. Respondent must cease or avoid harassment of another person
- #### f. Respondent must avoid petitioner's residence or any premises temporarily occupied by petitioner, or both

- Includes current and future residences/premises

[§_813.125\(4\)\(am\)](#)

- EXCEPT: If petitioner and respondent not married, and respondent owns premises where petitioner resides, and petitioner has no legal interest in premises

— May order respondent to avoid premises for reasonable time until petitioner relocates, and

— Shall order respondent to avoid petitioner's new residence for duration of TRO

g. Respondent must refrain from removing, hiding, damaging, harming, or mistreating, or disposing of, a household pet, and petitioner may retrieve a household pet

- Injunction may also allow the petitioner (or a family member or household member) to retrieve a household pet

4) Duration and modification of injunction

[§_813.125\(4\)\(c\)](#)

a. Injunction is effective for up to 4 years, EXCEPT

§ 813.125(4)(d)

- Ct or CCC may order that injunction is in effect for not more than 10 years, if finds, by preponderance of evidence, any of following
 - Substantial risk respondent may commit first- or second-degree intentional homicide against petitioner
 - Substantial risk respondent may commit first-, second-, or third-degree sexual assault or first- or second-degree sexual assault of child against petitioner
- A Judge or CCC may order that the injunction is in effect permanently if the respondent has been convicted of a violation of § 940.225(1)–(3) (first-, second-, or third-degree sexual assault) in which the petitioner was the crime victim

§ 813.125(4)(d)2.

- b. Petitioner not prohibited from requesting new TRO or injunction before or at expiration of previously entered order or injunction

§ 813.126(1m)

- c. If a respondent's criminal conviction that formed the basis for a permanent injunction has been vacated, the respondent may file a motion requesting a hearing to review the injunction. At the hearing, if the Judge finds that the conviction forming the basis for the permanent injunction has been vacated, the Judge shall modify the duration of the injunction or vacate the injunction. The Judge shall consider all relevant factors, including risk to petitioner, but no modified injunction may be in effect for longer than the maximum period allowable when the injunction was first ordered if the injunction had not been permanent

§ 813.125(4m)(a)

- 5) If injunction granted, Ct or CCC may prohibit respondent from possessing firearms

US v Rahimi[144 S. Ct. 1889](#) (2024)

- a. Only if clear and convincing evidence at hearing on injunction that respondent may use firearm to cause physical harm to another or endanger public safety

18 [USC](#) 922(g)(8)

- Caveat: Federal law makes it illegal for respondent to possess a firearm if harassment is of intimate partner or child and Ct finds respondent is credible threat to physical safety of such person or if injunction explicitly prohibits use, attempted use, or threatened use of physical force against such person that would reasonably be expected to cause bodily injury, regardless of whether respondent may use a firearm

§ 813.125(4m)(b)

- b. Prohibition of possession of firearms remains in effect until expiration of injunction

- 6) Order prohibiting possession of a firearm shall

§ 813.125(4m)(c)

§ 941.29

- a. Inform respondent of requirements and penalties under § 941.29 and any similar applicable federal laws and penalties

§ 813.125(4m)(cg)

- EXCEPT: If respondent is a peace officer who possesses a firearm as a condition of employment

§_813.125(4m)(c)2.

b. Require in writing surrender of any firearms respondent owns or has in possession to

- Sheriff of Cty where action commenced
- Sheriff of Cty where respondent resides
- Person designated by respondent and approved by Ct or CCC in accordance with §_813.1285

§_813.1285(7)(b)

c. If respondent surrenders a firearm owned by another person, person who owns firearm may apply for its return to the Ct in Cty where firearm surrendered

- Ct must give notice it considers adequate to all persons who may have interest in firearm and hold hearing as to claim to true ownership
- If right to possession proved to Ct's satisfaction, Ct must order firearm returned

[RMC Form CV-432](#)

- If firearm returned, Ct must inform person to whom it is returned that knowingly furnishing respondent with firearm during period of injunction could make person subject to requirements and penalties under §_941.2905 (straw purchasing of firearms)

§_813.1285(7)(a)

7) Return of firearm

a. Before surrendered firearm returned to respondent, Ct or CCC shall determine that

- Injunction has been vacated or has expired and not been extended
- Respondent not prohibited from possessing a firearm by any state or federal law or Ct order

§_165.63

— Ct or CCC shall use information provided under §_165.63 in making determination

§_813.126

J. New Hearing

[RMC Form CV-503](#)

- 1) Motion for hearing de novo of a determination, order, or ruling, entered under §§_813.12, 813.122, 813.123, or 813.125 by a CCC, including denial of request for TRO, must be filed within 30 days after issuance
- 2) Ct shall hold de novo hearing within 30 days after motion filed unless Ct finds good cause for extension

§_813.126

- 3) Any determination, order, or ruling by CCC remains in effect until Ct in de novo hearing issues final determination, order, or ruling

K. Enforcement of orders

§_813.125(7)

- 1) Misdemeanor prosecution—Whoever knowingly violates an harassment TRO or injunction may be fined \$10,000 or imprisoned up to 90 days, or both

§_973.09(2)(a)

Probation for up to 2 years may be appropriate

§_813.129

§_301.49

- 2) If respondent knowingly violates TRO or injunction, in addition to other penalties, Ct may report violation to DOC immediately upon respondent's conviction and may order respondent to submit to GPS tracking

a. Before issuing order, Ct must find respondent more likely than not to cause serious bodily harm to petitioner

b. Ct to consider:

- Whether respondent has allegedly
 - Caused physical injury
 - Intentionally abused pets
 - Intentionally damaged property
 - Committed sexual assault
 - Committed act of strangulation, or
 - Committed forcible entry to gain access to petitioner
- Whether respondent threatened any individual, including petitioner, with harm
- Whether respondent has history of improperly using or threatening to use firearm or other dangerous weapon
- Whether respondent has expressed suicidal ideation

- Whether respondent has exhibited obsessive or controlling behavior toward petitioner or petitioner's family member, including stalking, surveillance, or isolation of petitioner or petitioner's family member
 - Respondent's mental health history
 - Whether respondent has history of abusing alcohol or controlled substance
- c. Ct may request DOC to provide validated risk assessment of respondent to make findings required in [paras. a. and b.](#) above
- d. If Ct orders GPS tracking, Ct shall provide petitioner with referral to domestic-violence or sexual-assault victim service provider

5.

Notice and Process for Firearm Surrender

[§_813.1285\(1\)\(am\)](#)

A. Applies to injunctions issued as follows:

- 1) All domestic abuse injunctions under [§_813.12\(4\)](#)
- 2) All child abuse injunctions under [§_813.122\(5\)](#)
- 3) Individuals-at-risk injunction if Ct requires individual to surrender firearms under [§_813.123\(5m\)](#)
- 4) Harassment injunction if Ct requires individual to surrender firearms under [§_813.125\(4m\)](#)
- 5) Includes injunction stayed under [§_813.1285](#)

[§_813.1285\(1g\)](#)

B. Surrender and extend order

- 1) If Ct issues surrender and extends order Ct shall do all of the following:
 - a. Order respondent to surrender, in 48 hours or less, any firearm owned or possessed to sheriff, or, in Ct's discretion to other person
 - b. Order that respondent may possess or transport firearm only to surrender

- c. If Ct stays injunction, order respondent subject to TRO during stay and extend TRO for 48 hours for firearm surrender
- d. Inform respondent when injunction will take effect and penalty for possessing firearm while injunction in effect
- e. Instruct respondent how to surrender firearm
- f. If appropriate, order respondent to attend hearing to surrender firearm

§_813.1285(1m)

C. If Ct required to extend TRO under §_813.1285, and TRO not previously granted, Ct on own motion, shall reconsider and grant TRO

D. Firearm possession determination

§_813.1285(2)(a)

- 1) If respondent present at injunction hearing, Ct shall stay injunction for up to 48 hours and extend TRO for 48 hours for firearm surrender

§_813.1285(5)(a)

- a. Respondent shall provide completed firearm possession form

§_813.1285(2)(a)

- b. Ct shall verify information on firearm possession form and inquire on record as to contents of form

§_813.1285(2)(b)

- 2) If respondent not present at injunction hearing, Ct shall provide petitioner opportunity to inform Ct orally or in writing whether petitioner believes respondent possesses firearm
 - a. If petitioner informs Ct respondent possesses firearm, Ct shall request petitioner to inform orally or in writing how many firearms petitioner believes respondent possesses
 - As to any firearm respondent believed to possess, petitioner must provide

— Make

— Model

— Location

§_813.1285(2)(c)1.

- 3) If firearm possession form indicates respondent does not possess firearm, and Ct, after inquiry, satisfied respondent does not possess firearm, Ct shall
 - a. File firearm possession form

b. Lift stay of injunction

c. Dismiss TRO extended under [Sec. D.1](#)), above

§_813.1285(2)(c)2.

4) If firearm possession form indicates respondent possesses firearm, and respondent has not surrendered it, Ct shall do all of the following

a. Continue stay of injunction under [Sec. D.1](#)), above, for up to 48 hours

b. Issue surrender and extend order

c. Schedule hearing to surrender firearm within one week after injunction hearing

§_813.1285(2)(c)3.

5) If petitioner indicates respondent possesses firearm or Ct not satisfied respondent does not possess firearm, Ct shall schedule hearing to surrender firearms to occur within one week after injunction hearing

a. Ct shall do ONE of following:

- Continue stay under [Sec. D.1](#)), above, and issue surrender and extend order
- Lift stay of injunction
- Schedule hearing to surrender firearms for any reason relevant to surrender of firearms

E. Surrender of firearms

§_813.1285(3)(a)

1) Unless Ct notes another reason relevant to surrender of firearms, which requires hearing to surrender firearms, Ct shall dismiss hearing to surrender firearms if respondent surrenders firearm in one of the following manners:

§_813.1285(3)(a)1.

a. Respondent surrenders firearm to another person and all of the following apply:

- Respondent and person to whom respondent surrendering firearm appear at injunction hearing
- At hearing, person testifies under oath that person received firearms listed on respondent's firearm possession form
- At hearing, Ct determines person not prohibited from possessing firearms

- Ct informs person to whom firearm surrendered of requirement and penalties under [§_941.2905](#)
- Ct, after considering all relevant factors and any input of petitioner, approves surrender

[§_813.1285\(3\)\(b\)](#)

- b. If Ct approves surrender and if Ct issued surrender and extends order and stayed injunction, Ct shall lift stay and dismiss TRO

[§_813.1285\(3\)\(a\)2.](#)

- 2) Respondent surrenders firearm to sheriff within 48 hours after injunction hearing ordering surrender of firearms and provides copy of receipt to Clerk of Ct per [§_813.1285\(6\)\(b\)](#)

[§_813.1285\(3\)\(a\)3.](#)

- 3) Respondent surrenders firearm to sheriff and person who appeared at injunction hearing takes possession of firearm from sheriff if ALL of the following apply:
 - a. Ct informs person to whom firearm surrendered of requirements and penalties under [§_941.2905](#)
 - b. Ct, after considering all relevant factors and any input from petitioner, approves surrender
 - c. Sheriff determines person is not prohibited from possessing firearm

F. Hearing to surrender firearms

[§_813.1285\(4\)\(a\)](#)

- 1) Unless Ct dismisses hearing to surrender firearms, respondent for whom hearing scheduled must attend

If respondent fails to attend, Ct shall issue arrest warrant for respondent

[§_813.1285\(4\)\(b\)](#)

- 2) At hearing to surrender firearms, Ct shall:
 - a. Stay injunction for up to 48 hours
 - b. Extend TRO for 48 hours
 - c. Ensure respondent has completed firearm possession form and verify information on form if information not already verified under [Sec. D.1](#)), above
 - d. Make inquiry on record as to contents of form
 - e. Do ONE of the following:

[§_813.1285\(4\)\(b\)1.](#)

- If respondent wants to surrender firearms to person not sheriff and who appears at hearing to surrender firearms, and if Ct, after considering all relevant factors and input from petitioner, approves surrender and informs person to whom firearms surrendered of requirements and penalties under §_941.2905, order respondent to surrender firearms in ONE of the following ways
 - To the person, after person testifies under oath of receipt of firearms listed on respondent's firearm possession form and after Ct determines person not prohibited from possessing firearm
 - To sheriff, who shall transfer firearms to person after determining person not prohibited from possessing firearm

§_813.1285(4)(b)1m.

- If respondent claims to have surrendered firearms to sheriff under §_813.1285(6)
 - Verify respondent surrendered all firearms
 - Lift stay of injunction
 - Dismiss TRO

§_813.1285(4)(b)2.

- Order respondent to surrender any firearm Ct finds respondent owns or possesses to a sheriff under §_813.1285(6)
- If respondent has not provided Ct, within 48 hours of hearing to surrender firearms, receipt under §_813.1285(6)(b) that shows surrender of all firearms subject to order, Ct shall presume respondent violating order and injunction and MAY do any of following:
 - Notify sheriff of violation for investigation and appropriate action
 - Schedule another hearing to surrender firearms
 - Issue warrant to sheriff ordering respondent be brought before Ct to show cause why respondent should not be held in contempt

§_813.1285(4)(b)3.

- If Ct orders respondent to surrender firearms to sheriff, Ct shall issue a surrender and extend order
- If Ct orders respondent to surrender firearms to person not sheriff, Ct shall lift stay of injunction and dismiss TRO

§_813.1285(4)(b)4.

- If firearm possession form indicates respondent does not possess firearm, and Ct, after inquiry, is satisfied respondent does not possess firearm, Ct shall

- File firearm possession form
- Lift stay of injunction
- Dismiss TRO

§ 813.1285(8)

G. Penalties

Respondent who violates order surrender and extension order is subject to fine of not more than \$10,000 or imprisonment not more than 9 months or both, in addition to any other penalty to which respondent is subject

6.

Interstate Enforcement of Protection Orders

18 [USC](#) 2265

A. Protection orders entitled to full faith and credit

18 [USC](#) 2266

B. Definitions

- 1) “Protection order” includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against a spouse or intimate partner
- 2) “Spouse or intimate partner” includes
 - a. A spouse or former spouse
 - b. A person who shares a child in common with the abuser
 - c. A person who cohabits or has cohabited with the abuser as a spouse
 - d. A person who is or has been in a social relationship of a romantic or intimate nature with the abuser
 - e. Any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the state in which the injury occurred or where the victim resides

18 [USC](#) 2265

C. Requirements

- 1) Issued by Ct of another state, US territory, or Indian tribe, and

- 2) Such Ct has jurisdiction over the parties and matter under the law of such state, territory, or Indian tribe, and
- 3) Issued after a hearing in which respondent had reasonable notice and opportunity to participate, or
- 4) If ex parte, person received notice and had opportunity to be heard within reasonable time sufficient to protect due-process rights
- 5) Protects spouse or intimate partner of such other person
- 6) Order must include either
 - a. Finding that respondent represents credible threat to the physical safety of spouse, intimate partner, or child, OR
 - b. Explicit provision prohibiting respondent from using, attempting to use, or threatening to use physical force against spouse, intimate partner, or child that would reasonably be expected to cause bodily injury
- 7) Form addresses all requirements in cases relating to domestic abuse

§ 813.128

D. General rules

- 1) Wis Cts must give full faith and credit to a foreign protection order if
 - a. Order was obtained after respondent had reasonable notice and opportunity to be heard, so as to protect respondent's due-process rights
 - b. Non-Wis Ct had jurisdiction over parties and subject matter
 - c. Order identifies protected individual and respondent
 - d. Order is currently in effect

FA 18: LEGAL SEPARATION AND ANNULMENTS

LEGAL SEPARATION

1. Requirements

[§_767.301](#)

[§_767.35](#)

A. Action for legal separation has same requirements as action for divorce EXCEPT

B. Residence

- 1) At least one party must be resident of Cty for 30 days immediately preceding commencement of action

Siemering v Siemering

[95 Wis. 2d 111](#)

(Ct. App. 1980)

- 2) Action for legal separation, properly commenced, can be converted to divorce IF divorce residency requirements are met at time judgment granted
- 3) Divorce petition filed without residency does not commence action and CANNOT later be amended to petition for legal separation

2. Petition

A. Contents of petition

- 1) Same as divorce EXCEPT

[§_767.215\(2\)\(f\)](#)

- 2) Petitioner must state specific reason for seeking relief of legal separation

[§_767.215\(2\)\(cm\)](#)

- 3) Both parties, under [§_767.315\(2\)](#) may state under oath or affirmation that marital relationship is broken

[§_767.35](#)

B. Power of Ct when petition for legal separation

- 1) If both parties agree, grant decree of legal separation

[§_757.69\(1\)\(p\)1.](#)

- a. CCC may preside at hearing and grant and enter judgment if assigned to assist in matters affecting family, and
 - Both parties state that marital relationship is broken and that all material issues are resolved, or
 - One party does not participate in the action
- b. CCC does not modify agreement between parties on material issues
 - If CCC does not approve stipulation, must certify to Ct for trial

Husting v Husting
[54 Wis. 2d 87](#) (1972)

- 2) If respondent requests decree of divorce, Ct should consider
 - a. Possibility of reconciliation
 - b. Whether in best interest of parties to grant legal separation
 - c. Effect on minor children involved
 - d. Whether petitioner's demand for legal separation based on conscientious objection to divorce

3. Judgment

A. Judgment of legal separation

[§ 767.35\(2\)](#)

- 1) When dispute as to whether Ct should grant legal separation or divorce, Ct shall decide which appropriate
- 2) If parties reconcile, upon application for revocation, Ct to make just and reasonable orders

[§ 767.35\(5\)](#)

Bartz v Bartz

[153 Wis. 2d 756](#)

(Ct. App. 1989)

- 3) Either party can petition for legal separation to be converted to divorce after separation of one year
- 4) Ct shall convert decree to divorce, if requested

B. Findings of judgment

[§ 767.215\(2\)\(c\)](#)

- 1) Ct must find

- a. Marriage is irretrievably broken, or
- b. Parties agreed at trial that marriage is irretrievably broken, or
- c. Both parties file petition that marital relationship is broken

[§ 767.315\(2\)](#)

§ 767.41, § 767.511
 § 767.513, § 767.56
 § 767.61

- 2) Ct to make findings concerning issues of health and financial needs considered in dividing the property or in granting maintenance—on child custody, child support, children’s health-care expense, maintenance, and property division

ANNULMENTS

1. Jurisdiction

§ 767.301

A. Residence

- 1) At least one party must be resident of Cty for at least 30 days immediately preceding commencement of action, or

Comment

Different residency requirements for annulment and divorce

- 2) Marriage contracted in Wis less than one year before commencement of action

B. Personal jurisdiction

§ 801.05(1)

- 1) Respondent present in or domiciled in Wis when served, or

§ 801.05(11)

- 2) Respondent resided in Wis in marital relationship with petitioner for at least 6 consecutive months in 6 years immediately preceding commencement of action and is personally served, or

§ 801.06

- 3) Respondent makes general appearance

§ 801.07(5)

C. Quasi in rem jurisdiction

- 1) For determination of marital status only

- a. Not sufficient jurisdiction for determination of legal custody and periods of physical placement, nor for financial matters

§ 801.07(5)

- b. Ct need not have grounds for personal jurisdiction under § 801.05

- 2) Respondent must be served by personal or substitute service or by publication and mailing, in accordance with [§_801.11\(1\)](#)

See Contested Divorce, [FA 2](#)

- 3) Residency requirements must be met

[§_767.41\(1\)\(a\)](#)

D. Child custody jurisdiction

- 1) Ct must have jurisdiction under UCCJEA, [Ch](#) 822
- 2) See [FA 15](#) for requirements

2. Service, Commencement of Action, Pretrial Matters

A. Same as in divorce or legal separation actions

B. See Contested Divorce, [FA 2](#)

3. Grounds for Annulment

Comment

A. Very short marriage is not grounds in itself for an annulment

[§_767.313\(1\)](#)

B. Lack of capacity to consent to marriage at time solemnized

- 1) Because of age, mental incapacity or infirmity, influence of alcohol or drugs or other incapacitating substances
- 2) Action brought by either party or legal representative of incapacitated party
- 3) Must be brought within 1 year after discovery of condition

[§_767.313\(1\)\(a\)](#)

C. Marriage induced by force, duress, or fraud involving essentials of marriage

- 1) Suit brought by either party
- 2) Suit must be brought within 1 year after discovery of force, duress, or fraud

3) Fraud involving essentials includes false representation that

Masters v Masters

[13 Wis. 2d 332](#) (1961)

- a. Woman is pregnant when she is not

Heup v Heup

[45 Wis. 2d 71](#) (1969)

- b. Man or woman wants to have children
 - Fraud demonstrated by failure to have sexual relations, or
 - Use of contraceptives

- c. Does not include false representations of financial worth

Heup v Heup

[45 Wis. 2d 71](#) (1969)

4) Defrauded party must prove

- a. Falsity of representation at time of marriage
- b. Fact that moving party would not have entered marriage except for the false representation

Rascop v Rascop

[274 Wis. 254](#) (1956)

5) Fraud must be proved by clear and satisfactory evidence

[§_767.313\(1\)\(b\)](#)

D. Lack of physical capacity to consummate marriage

- 1) At time of marriage, other party did not know of incapacity
- 2) Suit brought by either party
- 3) Within 1 year after discovery of incapacity by party who found out

[§_767.313\(1\)\(c\)](#)

E. Party was age 16 or 17 and married without consent of parent or guardian or judicial approval, or was under age 16

- 1) Brought by underage party at any time before reaching 18
- 2) Brought by parent or guardian of underage party within 1 year after discovery of marriage and before child reaches 18

[§_767.313\(1\)\(d\)](#)

F. Marriage prohibited by law

- 1) Brought by either party
- 2) Within 10 years after marriage
 - a. 10-year limitation does not apply when either party has another spouse living at time of marriage, and impediment has not been removed under [§_765.24](#)

[§_765.24](#)

- Impediment is removed by death or divorce of either party to former marriage

[§_765.24](#)

- 3) Bigamous marriage becomes legal when
 - a. Marriage contract under [§_765.16](#) entered into in good faith by one of parties
 - Without knowledge of former marriage, or
 - In full belief that former spouse was dead, or
 - In full belief that former marriage had been annulled or dissolved by divorce, and
 - b. Parties are together as husband and wife, and
 - c. After death or divorce of other party to first marriage, parties continue to live together as husband and wife, in good faith on part of one of them

[§_767.803](#)

Smith v Smith

[52 Wis. 2d 262 \(1971\)](#)

- 4) On removal of impediment to legality of marriage, parties are legally married, and children are marital issue of both parents

[§_765.03\(2\)](#)

Ellis v Est of Toutant

(In re Est of Toutant)

[2001 WI App 181](#)

[247 Wis. 2d 400](#)

- 5) Marriage within 6 months after divorce

See McLeod v Mudlaff

(In re Est of

Laubenheimer)

[2013 WI 76](#)

[350 Wis. 2d 182](#)

a. Marriage entered into within 6 months after divorce is void; in judicial proceedings, Ct voids marriage

- Marriage NOT annulled

§_767.313(2)

G. No annulment permitted after death of either party to marriage

§_767.313(2)

Ellis v Est of Toutant

(In re Est of Toutant)

[2001 WI App 181](#)

[247 Wis. 2d 400](#)

Statute requires judicial proceedings to annul marriage, but provision prohibiting judicial action after death of party applies only to annulments

4. Trial

A. Appearance of parties

§_767.235(2)

- 1) Both parties required to appear unless
 - a. Nonresidence in State, shown by competent evidence, or
 - b. Service by publication, or
 - c. Ct order based on good cause
- 2) Order for appearance, if required, shall be procured by moving party
 - a. The Ct can issue order
 - b. Must be served on nonmoving party before trial or final hearing
 - c. Order not required if joint petition

Poncek v Poncek

[121 Wis. 2d 191](#)

(Ct. App. 1984)

- 3) Failure to serve order for appearance is harmless if respondent had actual knowledge of hearing and deliberately chose not to appear

50 [USC](#) §§ 3901–4043

- 4) Servicemembers Civil Relief Act

50 [USC](#) § 3931(b)(1)

- a. When party fails to appear, other party must file affidavit stating whether absent party is in active military service

50 [USC](#) § 3931(b)(2)

- b. If absent party in active military service, Ct may not enter judgment unless Atty appointed to represent and protect interest of party in military and, even then,

- Atty may not waive rights of party in military or bind party by Atty's act

- c. Stay of proceeding

50 [USC](#) § 3932

- Ct may, in its discretion, stay action
- Ct shall stay action on application of party in military, if application includes
- Letter setting forth facts stating manner in which current military duty requirements materially affect servicemember's ability to appear and stating date when servicemember will be available to appear
- Letter from servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for servicemember at time of letter

50 [USC](#) § 3935

- Stay for period of military service plus 90 days

- d. Ct may make other orders or enter judgments Ct deems necessary to protect party's interests under Servicemembers Civil Relief Act

B. Trial procedure

§_767.235(1)

- 1) Trial before Ct

§_767.235(3)

Comment

- 2) Ct may exclude all persons except parties, Attys, and GAL (but use sparingly because contrary to open access to Cts)

- a. On own motion, or on motion of any party

State ex rel Wis State

Journal v Cir Ct

[131 Wis. 2d 515](#)

(Ct. App. 1986)

- b. Must first hold hearing on question of closure

- c. Must publicly reach decision on closure based on exercise of discretion recognizing strong statutory presumption in favor of open proceedings

§_767.235(1)

See [SCR](#) ch. 71

- 3) Verbatim record must be made

On Ct order, testimony shall be transcribed and filed with the record

§_801.01(2)

- 4) Civil rules of procedure and evidence apply, unless otherwise provided in [Ch](#) 767

C. Matters to be proved at trial

- 1) Prerequisites to trial met

§_767.01, §_767.235(2)

§_767.301

- a. Jurisdictional and residential requirements
- b. All parties received notice and necessary orders for appearance issued
- c. All parties received information on services offered by Office of FCC and Family Ct Services
- d. Financial disclosure statements filed

§_767.105

§_767.127(1)

- 2) Additional prerequisites to trial if minor child(ren)

§_767.127(1m)

- a. Health insurance policy and plan information filed
- b. If legal custody or physical placement contested (See **Custody/Placement**, [FA 13](#))
 - Ct notified that mediation inappropriate or mediation failed

§_767.405

D. Evidence presented at trial

§_767.215

- 1) Proving allegations of petition

§_767.313

- 2) That grounds for annulment present

§_767.127

- 3) Disclosing current assets and liabilities

[§_767.127\(1m\)](#)

- 4) Disclosing health insurance policies and plans (if minor children)
- 5) As required by other relevant matters, e.g., child custody and physical placement, maintenance, and support

5. Stipulations

A. See Stipulated Divorce, [FA 1](#)

B. Consider approval of stipulations

[§_767.34](#)

- 1) Parties may, subject to approval of Ct, stipulate for
 - a. Division of estate
 - b. Maintenance payments
 - c. Support of children
 - d. Child custody and physical placement

Bliwas v Bliwas

[47 Wis. 2d 635](#) (1970)

C. Stipulations are recommendation of parties, not binding on Ct

- 1) When Ct adopts stipulation, makes it part of judgment and does so on own responsibility

Norman v Norman

[117 Wis. 2d 80](#)

(Ct. App. 1983)

- 2) Stipulation is merely a noncontractual joint recommendation to the Ct

Miner v Miner

[10 Wis. 2d 438](#) (1960)

- 3) Must examine parties and determine if they
 - a. Understand stipulation, and
 - b. Voluntarily entered into it

D. Child custody and physical placement stipulations

1) Ct should make record establishing child's best interests

2) See **Custody/Placement**, [FA 13](#)

§_767.803

3) Children of all marriages declared void are marital children

E. Financial matters stipulations

Miner v Miner

[10 Wis. 2d 438](#) (1960)

1) Ct must examine stipulation carefully against background of full information on parties' economic status and resources

§_767.34(2)(am)

2) Ct may not approve stipulation for family or child support as percentage of payer's income unless all following apply

a. State is not real party in interest

b. Payer not subject to any other order, in any other action, for payment of child or family support or maintenance

c. All payment obligations included in order, other than the annual receiving and disbursing fee under [§_767.57\(1e\)\(a\)](#), are expressed as a percentage of payer's income

Miner v Miner

[10 Wis. 2d 438](#) (1960)

F. Ct may modify stipulation in interest of justice

Comment

Ct should give parties an opportunity to accept modification, or repudiate stipulation and try case as contested proceeding

Norman v Norman

[117 Wis. 2d 80](#)

(Ct. App. 1983)

G. If either party repudiates stipulation before or during trial, must set case for trial as contested proceeding

6. Findings

§_767.01, §_767.301

A. Determine that jurisdictional and residence requirements have been met

§_767.313

B. Determine whether grounds for annulment have been proved

§_767.313

C. Grant or deny annulment

D. Determine related matters (See Findings in Contested Divorce, [FA 2, Sec. 8](#))[§_767.241](#), [§_767.511](#)[§_767.531](#), [§_767.56](#)[§_767.61](#)

- 1) Determine financial matters in accordance with applicable law

[§_767.41](#)

- 2) Determine legal custody and physical placement in accordance with applicable law

[§_767.43](#)

- 3) Determine visitation rights of other persons if petition filed

See Visitation Rights of Certain Persons, [FA 14](#)

- 4) Make other appropriate findings and conclusions

7. Judgment[§_767.251](#)**A. Direct moving party to draft findings of fact and conclusions of law, and written judgment**

- 1) Findings and judgment submitted to Ct and filed with Clerk within 30 days after judgment
- 2) But if other party represented by Atty, must be submitted to counsel for approval
- 3) When necessary approvals obtained, submitted to Ct, with final stipulations of parties appended

Comment

- 4) If approvals not forthcoming, Ct can either set hearing or enter appropriate findings, conclusions of law, and judgment on own motion

Comment

- 5) Judgment in annulments similar to judgments in Divorce (*See Findings in Contested Divorce, [FA 2, Sec. 8](#)*) except for admonition against marrying for 6 months

B. Warnings that must appear in judgment[§_767.41\(8\)](#)

- 1) If child legal custody and physical placement decided, that intentionally concealing minor child from other parent or taking child without consent, to deprive other parent of custody or period of physical placement, is a felony under [§_948.31](#)

See Custody/Placement, [FA 13](#)[§_767.41\(6\)\(h\)](#), *as created**by 2017 Wis Act 203*

- 2) That if court orders legal custody and periods of physical placement in actions commenced on or after April 5, 2018 (including actions to modify judgments or orders previously granted),
 - a. Each parent must notify other parent, CSA, and Clerk of Ct of address at which they may be served within 10 business days after moving to that address;
 - b. Address provided to Ct is address on which other parties may rely for service of any motion relating to modification of legal custody or physical placement or to relocating child's residence; AND
 - c. Parent granted periods of physical placement must obtain Ct order before relocating with child 100 miles or more from other parent if other parent also has Ct-ordered periods of physical placement with child

§_767.251(1)

- 3) If maintenance or support ordered, that disobedience of Ct order is contempt punishable by imprisonment under [Ch 785](#)

See chapters on **Use of Contempt**, [FA 4](#), and **Other Enforcement**, [FA 5](#)

Comment

- 4) No oral admonitions required, EXCEPT as in [Sec. C.](#) below

C. TPR warning

§_767.41(4)(cm)

- 1) If Ct denies periods of physical placement to a parent, warnings under [§_48.356](#) must be given to that parent

[§_48.356](#)

- a. Inform of any applicable grounds for TPR under [§_48.415](#)
- b. Inform of conditions necessary for return of child

- 2) Warning must be given orally and in writing

D. Effect of annulment

Falk v Falk

[158 Wis. 2d 184](#)

(Ct. App. 1990)

- 1) Maintenance obligation terminates upon remarriage even though the subsequent marriage was void

Example: Subsequent marriage occurred before expiration of 6-month waiting period

FA 19: OTHER ACTIONS

1. Action to Affirm Marriage

§_767.18

A. May be commenced

- 1) When either party to marriage denies or doubts validity of marriage
- 2) By other party
- 3) Can be coupled with divorce action if parties married during prohibited 6-month period following one party's Wis divorce

§_767.301

B. Residence, jurisdiction

- 1) As in action for annulment

C. Procedures and grounds

- 1) As in action for annulment, see **Annulment**, [FA 18](#)

§_767.205(3)

- 2) Petition entitled "In re marriage of..."

§_767.18

D. Judgment

- 1) Shall either declare marriage valid or annul it
- 2) Conclusive upon all persons concerned

2. Recognition of Putative Marriage

Xiong v Vang

[2017 WI App 73](#)

[378 Wis. 2d 636](#)

- A. Void or voidable marriage solemnized in proper form and celebrated in good faith by one or both parties shall have legal effect of valid marriage as long as recognition would not violate public policy

3. Foreign Judgments

§_767.041

- A. State Cts are to recognize foreign divorces and orders. Full faith and credit given to other states' judgments in actions affecting family

- 1) If by Ct of competent jurisdiction in State, territory, or possession of U.S., and
- 2) Both spouses personally appeared, or respondent was personally served

Sharp v Sharp
[185 Wis. 2d 416](#)
 (Ct. App. 1994)

- 3) Venue in Cty where filed, subject to discretionary change of venue

[§_767.055](#)

B. No full faith and credit given to other states' judgments in divorce proceeding when

- 1) Ct lacked subject-matter jurisdiction because both parties were domiciled in Wis at time proceeding commenced

a. Prima facie proof of domicile in Wis

- Domiciled in Wis within 12 months before commencement of divorce proceeding, and resumed residence within 18 months after departure, or
- Maintained place of residence in Wis at all times after departure and before return

- 2) Other Ct lacks jurisdiction for other reasons, e.g., no jurisdiction under the laws of the rendering state

[§_767.041\(3\)](#)

C. Full faith and credit does not apply to child custody proceedings

[Ch 822](#)
 28 [USC](#) 1738A

- 1) Governed by Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and Parental Kidnapping Prevention Act (PKPA)

[§_767.041\(2\)](#)

*see also Recognition of
 Foreign Decrees*, Wis Bar
 Bull, Feb. 1965, at 30

D. Judgments of Cts of foreign countries may be recognized

- 1) If by Ct of competent jurisdiction, and
- 2) In accordance with principles of international comity

22 [USC](#) 9001–9011
 (Hague Convention's
 implementing
 legislation)

- 3) NOTE: Jurisdiction in child custody actions governed by UCCJEA + PKPA + Hague Convention

Haeuser v Haeuser[200 Wis. 2d 750](#)

(Ct. App. 1996)

E. Under “divisible divorce” doctrine, if another state grants judgment of divorce but does not provide for maintenance or property division, full faith and credit applies to divorce only

- 1) Wis can obtain jurisdiction to determine maintenance and/or property division

Note

- 2) While Wis can obtain jurisdiction to determine maintenance or property division, case does not discuss child support but rationale should apply

4. Action to Compel Maintenance or Support[§_767.501](#)**A. If person fails or refuses to provide for support or maintenance for the person’s spouse or minor child, action may be initiated by**

- 1) Person’s spouse
- 2) Person with legal custody of child
- 3) Minor child
- 4) Nonlegally responsible relative, defined as
 - a. Relative who assumes responsibility for care of child without legal custody, but not in violation of Ct order
 - Not relative who has physical custody of child during Ct-ordered visitation period

[§_767.205\(2\)](#)[§_767.501\(3\)](#)

- 5) DCF, CSA, or person in charge of Cty welfare activities if
 - a. Completed application for legal services has been filed with child support program, or
 - b. State or subdivision provides public aid to child or ex-spouse, and
 - c. Person entitled to commence action to compel support fails or refuses to do so
 - d. State is real party in interest and Atty’s services do not create Atty-client relationship with any other party

[§_767.501\(2\)\(d\)](#)

B. No filing fee to be charged

- 1) After action commenced and filed, Ct may direct either party to pay part or all of fees and costs incurred

§_767.501(3)

C. Title of action is “In re Support or Maintenance of...”

§_767.501(2)

D. Ct shall determine amount person should reasonably pay

- 1) Ct shall consider factors governing child support or maintenance (§§_767.511, 767.56), as appropriate
- 2) Amount must be expressed as fixed sum unless parties stipulate to express as percentage of payer’s income and requirements of §_767.34(2)(am) met

E. Order may be changed or modified by Ct on notice of motion or order to show cause by either party on sufficient evidence**F. Enforcement by contempt, assignment of income under §_767.76, or other enforcement mechanisms of §_767.77**

- 1) See Use of Contempt, [FA 4](#), and Other Enforcement, [FA 5](#)

5. Actions for Interspousal Remedies

§_767.331

A. Relationship with action affecting the family

- 1) If a spouse has begun action for interspousal remedy under §_766.70, and either or both spouses subsequently bring action for divorce, legal separation, or annulment, interspousal remedy action may be consolidated with family Ct action
- 2) If actions are consolidated, to extent procedural and substantive requirements of [Ch 767 conflict](#) with requirements under §_766.70, [Ch 767](#) controls
 - a. [Ch 767](#) procedural and substantive requirements control
 - b. No §_766.70 action may be brought by one spouse against the other while a divorce, legal separation, or annulment action pending under [Ch 767](#)

§_766.70(1)

Gardner v Gardner

[175 Wis. 2d 420](#)

(Ct. App. 1993)

B. Breach of duty of good faith resulting in damage to marital property or claimant spouse’s individual property

- 1) Remedy: A spouse has a claim against the other for breach of duty of good faith imposed by [§_766.15](#) resulting in damage to claimant spouse's property

[§_766.15](#)

- 2) Duty: Spouse shall act in good faith with respect to other spouse in matters involving marital property or property of other spouse

- a. Duty may not be varied by marital property agreement

- b. Management and control of spouse's own nonmarital property in manner that limits, diminishes or fails to produce income from that property is not breach of good-faith duty

[§_766.70\(1\)](#)

- 3) Action must be brought within 6 years after acquiring actual knowledge of facts giving rise to claim

[§_766.70\(6\)](#)

- a. EXCEPT, when breach involves a gift of marital property that does not comply with [§_766.53](#) (See [Sec. G.](#), below)

[§_766.70\(2\)](#)

C. Action for classification of property or accounting of spouses' property and obligations

- 1) On request of a spouse, Ct may

- a. Order accounting

- b. Determine rights of ownership in, beneficial enjoyment of, or access to marital property

- c. Determine the classification of all property of spouses

[§_766.70\(3\)](#)

D. Action to have name of spouse added to marital property or to document evidencing ownership of marital property held in name of other spouse alone

- 1) On request of spouse, Ct may order spouse's name added

- 2) Does NOT apply to

- a. Interest in partnership or joint venture held by other spouse as general partner or participant

- b. Interest in a limited liability company held by other spouse as member

- c. Interest in professional corporation, professional association, or similar entity held by other spouse as stockholder or member
- d. Asset of unincorporated business if other spouse is only spouse involved in operating or managing business
- e. Corporation, stock of which is not publicly traded
 - Stock is publicly traded if traded on national stock exchange or quoted on national association of securities dealers automated quotations system and
 - Employees, officers, and directors of corporation own, in the aggregate, less than 10% in value of outstanding shares of corporation stock
- f. Interest in a digital property account, as defined in [§_711.03\(1\)](#)
- g. Other property, if addition of name would adversely affect rights of third person

[§_766.70\(4\)](#)

E. Marital property has been or is likely to be substantially injured by other spouse's gross mismanagement, waste or absence

- 1) On request of spouse, Ct may order any of following
 - a. Temporary or permanent limitation or termination of any of other spouse's management and control rights in marital property
 - b. Change in classification of marital property
 - c. Division of obligations of spouses existing on date of request, after considering classification of obligation under [§_766.55](#) and factors specified under [§§_767.56\(1c\)](#) and [767.61](#)
 - d. That obligations incurred after order are obligations of incurring spouse and that other spouse not liable for, and non-incurring spouse's property is not available to satisfy, the obligations
 - e. That any property acquired by either spouse after Ct order is individual property of acquiring spouse
- 2) Does NOT apply to (as further defined in [§_766.70\(3\)](#) and [Sec. D.2](#)), above)
 - a. Interest in partnership or joint venture held by other spouse as general partner or participant

- b. Interest in professional corporation, professional association, or similar entity held by other spouse as stockholder or member
- c. A corporation, stock of which is not publicly traded
- d. Other property if remedy would adversely affect rights of third person

3) Ct may make any order subject to any equitable condition

§_766.70(1)

4) Action must be brought within 6 years after acquiring actual knowledge of facts giving rise to claim

§_766.70(5)

F. Marital property has been used to satisfy obligation other than one arising from duty to support spouse or child of marriage or one in interest of marriage or family

1) On request of nonobligated spouse, Ct may order that spouse receive, as individual property, marital property equal in value to marital property used to satisfy obligations

a. Subject to rights of any third party who relied on availability of marital property to satisfy obligation under §_766.55(2)(a) or (b)

b. Subject to equitable considerations

2) Action must be brought within 1 year after obligation is satisfied

§_766.70(6)

G. Gift of marital property made during marriage that does not comply with §_766.53

§_766.53

1) Spouse with management and control rights may give marital property to third person of not more than \$1,000 in calendar year, or larger amount if reasonable considering economic position of spouses

a. Otherwise, spouses must act together in making gifts of marital property

§_766.70(6)

2) Other spouse may bring action to recover property or compensatory judgment equal to amount by which gift exceeded §_766.53 limit

a. Action brought against donating spouse, gift recipient, or both

b. If recovery occurs during marriage, it is marital property

c. If recovery occurs after dissolution of marriage or death of either spouse, limited to 50% of recovery that would have been available during marriage

- d. If gift is in form of joint tenancy and donor spouse and donee are joint tenants in that property, other spouse may obtain reimbursement from donor spouse or donee or both, for that portion of gift representing quotient resulting from dividing number of joint tenants other than donor spouse by total number of joint tenants, including donor spouse

3) Action must brought within earliest of

- a. 1 year after spouse has notice of gift, or
- b. 1 year after dissolution of marriage, or
- c. Within time for filing claims under § 859.01 after death of either spouse

6. Surrogacy/Parentage/Assisted Reproduction Technology

Wisconsin has very little statutory or case law touching on the issues of Surrogacy/Parentage and Assisted Reproduction Technology. As a result, courts are advised to read carefully the limited references to these processes that do exist in the statutes and case law before rendering decisions on these issues.

Definitions

Surrogacy—“the process by which a woman makes a choice to become pregnant and then carry to full term and deliver a baby who, she intends, will be raised by someone else.” *Rosecky v. Schissel (In re Paternity of F.T.R.)*, 2013 WI 66, ¶ 34, 349 Wis. 2d 84.

Traditional Surrogacy—the process whereby “the surrogate is the genetic mother of the child and is artificially inseminated with the sperm of the intended father or a sperm donor.” *Rosecky v. Schissel (In re Paternity of F.T.R.)*, 2013 WI 66, ¶ 35, 349 Wis. 2d 84.

Gestational Surrogacy—the process by which “sperm is taken from the father (or from a donor) and an egg is taken from the mother (or from a donor), fertilization happens outside the womb (called *in vitro* fertilization), and the fertilized embryos are then implanted into the surrogate mother’s uterus.” The mother is not genetically related to the child. *Rosecky v. Schissel (In re Paternity of F.T.R.)*, 2013 WI 66, ¶ 35, 349 Wis. 2d 84.

Intended Parent—“an individual, married or unmarried, who manifests the intent ... to be legally bound as the parent of a child resulting from assisted or collaborative reproduction.” *Rosecky v. Schissel (In re Paternity of F.T.R.)*, 2013 WI 66 ¶ 34, 349 Wis. 2d 84.

Wisconsin Statutory Provisions

[Chapter 891. Presumptions](#)

891.40. Artificial Insemination

- (1) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband of the mother at the time of the conception of

the child shall be the natural father of a child conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and shall file the husband's consent with the department of health services, where it shall be kept confidential and in a sealed file except as provided in s. 46.03 (7) (bm). However, the physician's failure to file the consent form does not affect the legal status of father and child. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, may be inspected only upon an order of the court for good cause shown.

(2) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is not the natural father of a child conceived, bears no liability for the support of the child and has no parental rights with regard to the child.

Chapter 767, Actions Affecting the Family

767.87 Testimony and Evidence Relating to Paternity

...

767.87(9) ARTIFICIAL INSEMINATION; NATURAL FATHER. Where a child is conceived by artificial insemination, the husband of the mother of the child at the time of the conception of the child is the natural father of the child, as provided in s. 891.40.

...

Chapter 69, Collection of Statistics

69.14 Registration of Births

(1) FILING REQUIREMENTS.

...

(g) *Birth by artificial insemination.* If the registrant of a birth record under this section is born as a result of artificial insemination under the requirements of s. 891.40, the husband of the woman shall be considered the father of the registrant on the birth record. If the registrant is born as a result of artificial insemination which does not satisfy the requirements of s. 891.40, the information about the father of the registrant shall be omitted from the registrant's birth record.

(h) *Surrogate mother.* If the registrant of a birth record under this section is born to a surrogate mother, information about the surrogate mother shall be entered on the birth record and the information about the father shall be omitted from the birth record. If a court determines parental rights over the registrant, the clerk of court shall report the court's determination to the state registrar on a form prescribed by the state registrar, along with the fee required under s. 69.22. Upon receipt of the report, the state registrar shall prepare and register a new birth record for the registrant....

Wisconsin Case Law

L.M.S. v. S.L.S., [105 Wis. 2d 118](#) (Ct. App. 1981).

A sterile man entered into an agreement with his wife that she would become pregnant by another man. The wife had sexual intercourse with the other man and became pregnant. The other man complied with the agreement and never established a relationship with the child. His parental rights were terminated. The married couple eventually filed for divorce and wife sought child support from husband, which he opposed. The court of appeals held "that a husband who, because of his sterile condition, consents to his wife's impregnation, with the understanding that a child will be created whom they will treat as their own, has the legal duties and responsibilities of fatherhood, including support. A

husband who participates in the arrangement for the creation of a child cannot consider this a temporary relation to be assumed and disclaimed at will.”

Rosecky v. Schissel (In re Paternity of F.T.R.), [2013 WI 66](#), [349 Wis. 2d 84](#), [833 N.W.2d 634](#).

Two couples, the Roseckys and the Schissels, entered into a written parentage agreement (PA) wherein Monica Schissel was artificially inseminated with David Rosecky’s sperm. The agreement contemplated that upon the birth of the child Monica would terminate her parental rights and the child would be raised by the Roseckys. The parties had a falling out and, upon birth of the child, Monica no longer agreed to terminate her parental rights. The Roseckys sought enforcement of the agreement requiring Monica to terminate her parental rights and providing for the Roseckys to raise the child as their own. Monica opposed the request to enforce.

The Wisconsin Supreme Court held:

“The Wisconsin Statutes do not provide a specific answer as to whether the PA (parentage agreement) is enforceable, and they do not contain a statement of public policy against enforcement.”

“Aside from the termination of parental rights provisions in the PA at issue, we conclude a PA is a valid, enforceable contract unless enforcement is contrary to the best interests of the child.”

“We also conclude that the circuit court erroneously exercised its discretion by excluding the PA and rendering its custody and placement decision without consideration of the PA. We reverse the circuit court’s determination that the PA is enforceable and remand for a hearing on custody and placement, wherein the terms of the PA are enforced unless enforcement is contrary to the best interests of [the child].”

S.R. v. Circuit Court (In the Interest of P.L.L.-R.), [2015 WI App 98](#), [366 Wis. 2d 134](#).

On September 4, 2013, S.R. was artificially inseminated using sperm from an anonymous donor. On June 7, 2014, P.L.L.-R. was born. S.R. and C.L., both of whom are women, were married on June 13, 2014, in Wisconsin. In November 2014, S.R. and C.L. filed a petition with the circuit court entitled “Joint Petition for Determination of Parentage.” The petition contained two arguments supporting the position that the circuit court should find S.R. and C.L. as the natural parents of P.L.L.-R. First, that a gender-neutral reading of Wisconsin’s marital-presumption and artificial-insemination laws would result in the court being required to enter such a parentage order. Second, that the trial court should apply the doctrine of “intended parentage,” which would also require the court to enter a parentage order. The trial court opined that the petition, as filed, was seeking a declaratory judgment that Wisconsin’s marital-presumption and artificial-insemination laws are unconstitutional as written. Therefore, the attorney general of the state of Wisconsin should have been properly notified, but had not been so notified. The court then dismissed the matter on those procedural grounds.

R.B.O. v. Knutson (In re Paternity of J.W.O.T.), No. 2016AP952, 2017 WL 2199186 (Wis. Ct. App. May 18, 2017) (unpublished opinion not citable for persuasive value per section 809.23(3)(b)).

A same-sex married couple living in Virginia and an opposite-sex married couple living in Wisconsin entered into a surrogacy contract in which the Wisconsin wife was to be the gestational surrogate for a child and the Virginia couple were the intended parents. A petition for parentage was filed. During the pendency of this case, three different judges rotated into supervision of this file. The second of those judges appointed a guardian ad litem for the child. The guardian ad litem recommended that the matter be conducted as an adoption. On March 25, 2016, when the child was approximately seven months old, the second judge entered an order denying the joint petition, ordering a termination of parental rights of the surrogate mother and her husband and left in place a temporary order awarding custody and placement to the intended parents. The guardian ad litem submitted invoices for services exceeding \$100,000 and said invoices were approved by the second judge. The second judge stated, “the costs here are not ... even anywhere near a number I would think was unreasonable in total, compared to ... what’s at stake, which is the life of a child.” A third

judge then rotated into the case and granted a motion to reconsider the parentage petition and subsequently granted the petition for parentage. That third judge also found that he had no authority to vacate the approval of guardian ad litem fees. On appeal, the court of appeals reversed the order on guardian ad litem fees and advised that the trial court does have authority reconsider those fees.

Torres v. Seemeyer, [207 F. Supp. 3d 905](#) (W.D. Wis. 2016).

Chelsea Torres and Jessamy Torres are a same-sex couple married in New York in 2012. They are residents of Madison, Wisconsin. In 2014, Chelsea was artificially inseminated using an anonymous sperm donor. In 2015, after same-sex marriage became legal in Wisconsin, Chelsea gave birth to A.T. Although Jessamy and Chelsea requested a birth certificate listing both of them as parents, the Wisconsin Department of Health Services issued the certificate with Chelsea named as the sole parent. Plaintiffs filed suit alleging that the department's refusal to issue a two-parent birth certificate violates both the Equal Protection Clause and the Due Process Clause of the 14th Amendment. The court found that the Department of Health Services' practice before May 2, 2016, of enforcing [Wis. Stat. §.891.40\(1\)](#) against female married couples but not different-sex couples was unconstitutional. The department is to construe [Wis. Stat. §.891.40\(1\)](#) in gender-neutral terms. In particular, the word "husband" in sub. (1) should be construed to mean "spouse."

FA 20: SELF-REPRESENTED PARTIES

1. Sample Script: Questions for Parties

This script is intended for a divorce action in which neither party has an attorney.

Swear both parties.

Are you the petitioner/joint petitioner/respondent in this divorce action?

If a petition/joint petition is filed, ask petitioner/joint-petitioners the following:

You started this action by filing a petition/joint petition for divorce, which you signed under oath—is that correct?

You are acting as your own attorney in this case. Do you know you could have had your own lawyer?

Do you wish to proceed as your own attorney?

Do you feel you are capable of representing yourself?

Were the facts set forth in the petition for divorce true and correct when you signed it?

Are those facts all still true and correct today?

Do you believe your marriage is irretrievably broken?

If a petition is filed, ask the respondent:

You are acting as your own attorney in this case. Do you know you could have had your own lawyer?

Do you wish to proceed as your own attorney?

Do you feel you are capable of representing yourself?

Did you receive a copy of the petition for divorce?

Did you review it?

Were the facts set forth in the petition for divorce true and correct when you received it?

Are those facts all still true and correct today?

Do you believe your marriage is irretrievably broken?

Wife Only

The court needs to protect the rights of any unborn children. For that reason, I ask you, are you pregnant?

Are you asking to be restored to your birth surname, or any other legal name you have held? If so, please spell the name for me.

Both Parties

Did you file a final financial disclosure statement with the court?

I'll refer your attention to Exhibit _____. Do you see that document?

Is that a copy of your final financial disclosure statement?

Does the financial disclosure statement accurately set forth the financial circumstances of your marriage at this time?

Do you swear to the truth of its contents?

Also before you is Exhibit _____. Is that the respondent's/joint petitioner's financial disclosure statement?

And have you had a chance to review that prior to your testimony?

Do you dispute anything in the respondent's/joint-petitioner's financial disclosure statement?

Before you also is Exhibit ____, called a marital settlement agreement. Have you and your spouse entered into this marital settlement agreement to resolve all the issues in your divorce?

Have you both signed that document?

Do you understand the terms of the marital settlement agreement?

Do you have any questions about it?

Do you agree to be bound by all the terms of the marital settlement agreement?

Do you understand that if the court adopts the marital settlement agreement, it will become the judgment of the court and bind both of you?

Both of you agree in the marital settlement agreement to a waiver of maintenance—is that correct?

Do you know what you are giving up when you waive maintenance?

Do you have any health problems that prevent you from working?

Are you able to support yourself?

Do you understand that a waiver of maintenance is forever and you cannot request the court to award you maintenance at a later time if I approve the waiver today?

You have also agreed to a property division in the marital settlement agreement—is that right?

Do you understand that the law requires the court in a disputed divorce case to presume the assets and debts of the parties should be split equally?

Does your marital settlement divide your property equally? If not precisely 50/50, is the difference too close for the two of you to be concerned about?

Clarification by the court: If there is a deviation that is not “close,” explore the reasons for the deviation (property brought to the marriage, short-term marriage, etc.), and if you approve the deviation, briefly explain why.

Do either of you have any property in your possession that the other party should receive? *(If so, discuss arrangements to pick up or deliver.)*

In a case with minor children, ask the following:

If the parties have a separate parenting plan/mediated parenting agreement, ask the following:

Before you is Exhibit _____. Is that your agreed-upon parenting plan/mediated parenting agreement?

Is that the agreement you and your spouse made regarding your children?

The parenting plan/mediated parenting agreement contains provisions regarding custody and placement of your children. Do you believe these are in the child(ren)’s best interests?

If the custody and placement agreement is part of the marital settlement agreement, ask the following:

The marital settlement agreement contains provisions regarding custody and placement of your children. Do you believe these are in the child(ren)’s best interests?

Use this for all divorces with minor children:

Do you agree to be bound by these terms?

How long has the agreement been in effect? Does it appear to be working? Do you have any questions about the child-related provisions?

Are you familiar with the Wisconsin guidelines, which must be followed in setting child support?

Does your child support agreement follow these guidelines? If not, why not? *(Here the court may do a child support computation from the dashboard utility to make findings as to support deviation and say why the court approves or does not approve the deviation.)*

2. Sample Script: Granting the Divorce

Based upon the testimony of the parties, the court makes the following findings:

I am satisfied there does not appear to be any reasonable chance of the parties reconciling. As a result, I find the marriage irretrievably broken.

I find that the parties' incomes are set out in their financial disclosure statements.

I find the custody and physical placement provisions reached are in the best interests of the child(ren); and the child support agreed to is in pursuant to guidelines. (*Or a deviation is approved for reasons stated on the record.*)

I find the waiver (or the amount and duration of maintenance) to be fair because (*state rationale*).

I find the parties have divided their property on a 50/50 basis. (*If other than 50/50, state why split fair.*)

I therefore accept the entire marital property settlement agreement, incorporate it into the findings of fact, conclusions of law, and judgment of divorce, and grant to the parties a judgment of divorce thereon.

I must advise both parties that although under Wisconsin law your marriage ends today, neither of you is free to marry again in Wisconsin or any other state or country for a period of six months. Do you both understand this limitation?